U.S. Department of Labor

Office of Administrative Law Judges
William S. Moorhead Federal Office Building
1000 Liberty Avenue, Suite 1800
Pittsburgh, PA 15222

(412) 644-5754
(412) 644-5005 (FAX)

Issue Date: 25 April 2016

OALJ CASE NO.: 2016-TLC-00038
ETA CASE NO.: H-300-16061-811856

In the matter of:

BROKEN CIRCLE RANCH,
Employer

Before: Richard A. Morgan
Administrative Law Judge

DECISION AND ORDER

This matter involves a request for certification of non-immigrant foreign workers for temporary or seasonal agricultural employment under the Immigration and Nationality Act, as amended, and the implementing regulations promulgated by the United States Department of Labor. 8 U.S.C. §1101(a)(15)(H)(ii)(a); 20 C.F.R. Part 655, Subpart B.

For the reasons set forth below, I affirm the Certifying Officer's denial of temporary labor certification.

STATEMENT OF THE CASE

Broken Circle Ranch ("Employer") submitted an *H-2A Application for Temporary Labor Certification* (ETA Form 9142A) on March 1, 2016. AF-59-70.[1] Employer requested certification for one full-time worker from April 1, 2016 – October 1, 2016 with the job title of "General Farm Worker/Irrigation Worker." AF-59. Employer indicated that the job was a "seasonal need." AF-59. The Employee would be required to work for 48 hours per week at a rate of pay of $11.75 per hour. AF-61-63. The required job duties were described as follows:

> Worker will be required to perform a variety of duties related to the production of hay. General Farm Work will include the following responsibilities; gather and remove rocks from field; replace/repair fencing; operate motor bike or all-terrain vehicle in the course of performing duties; maintain, drive, attach and operate farm implements/tractors/equipment to till soil plant cultivate, fertilize and harvest crops; perform general cleanup of farm areas; herd livestock. Irrigation

[1]For purposes of this opinion, "AF" refers to "Administrative File."

> work will include the following: Hand lines: connect pipes; check alignment of pipe and adjust for proper water distribution attach lines to water supply; turn on pump turn valves to start flow of water; disassemble lines and carry pipes across fields at specified intervals; move pipes through freshly irrigated crops and/or plowed fields where mud may be deep.

AF-61.

In regard to job requirements for the job, ETA Form 9142 A (F) indicates no education or job training is required. Employment experience of "1 month" is required in the occupation of "General farm worker/Irrigation worker." AF-62. ETA Form 790 (Agricultural and Food Processing Clearance Order) Item # 15 states the following regarding Special Requirements/Qualifications: "Applicants must have 1 month experience as a general farm worker. It is further stated that "applicants hired must be able to obtain a valid Driver's License as driving on public roads may be required." AF-73. Other requirements listed on Form 790 at Item 16 are the following: "1) Driver requirements, 2) Extensive sitting, 3) Exposure to extreme temperature, 4) Lifting requirement, 5) Extensive pushing and pulling, 6) Extensive walking, and 7) Frequent stooping." AF-73.

On March 8, 2016, the Certifying Officer ("CO") issued a Notice of Deficiency to Employer. AF-44. In its Notice of Deficiency, the CO provided three reasons why the Employer's application was defective. AF-46-47.

First, the CO noted that a completed Application for Temporary employment Certification must be filed with the Chicago NPC no less than 45 calendar days prior to the start date of need. In this case the employer submitted their application on March 1, 2016 which is only 31 days prior to the April 1, 2016 stated start date of need.

The second deficiency involved the daily subsistence amount of $11.86 which was stated in the application. The applicable regulation requires that this amount cannot be less than $12.09 per day.

The third deficiency noted by the CO involved the maximum amount of daily subsistence for which the Employer would reimburse the worker, if receipts were provided. By regulation, this amount must reflect a maximum reimbursement of $51.00 per day while the application stated a maximum of $46.00 per day.

Employer's representative emailed a response to the Notice of Deficiency on March 8, 2016 in which Employer amended the Application for Temporary Employment Certification to reflect a start date of need on April 15, 2016 (rather than April 1, 2016), a daily subsistence amount of $12.09 per day (rather than $11.86 per day), and a maximum subsistence reimbursement of $51.00 per day (rather than $46.00 per day). Thus Employer corrected the three deficiencies noted by the CO. AF-38-43.

The CO notified the Employer by letter dated March 15, 2016 that the application had been "accepted for processing." AF- 32-37. The CO notified the Employer in this letter that it would have to cooperate with the State Workforce Agency (SWA) serving the intended area of employment. The SWA had prepared a job order for intrastate recruitment of U.S. workers and would now commence interstate recruitment for the position at issue. The CO also notified the

Employer of other positive recruitment steps that it was required to make in compliance with the regulations. See 20 C.F.R. §655.135(c), §655.154. The recruitment requirements include the submission by the Employer of a "written recruitment report." See 20 C.F.R. §655.156. Additionally, Employer was notified of the following: "Any U.S. worker who applies to you, but whom you reject for other than a lawful, job-related reason or fail to provide with a lawful, job-related reason for rejection, will be considered available for work by our office." See 20 C.F.R. §655.161.

By email dated March 24, 2016 Employer filed its "positive recruitment report" and notified the CO that it had interviewed three U.S. workers for the position. In this report Employer indicated that, 1) Troy Brooks was not hired "because he did not have the required 1 month general farm work experience; 2) Brandon Meador was not hired "because he did not have experience with moving wheel-lines as defined in item 16 of the ETA form 790"; and 3) Mike Moore was not hired "because [he] had found other employment." AF-28-30.

By letter dated April 6, 2016, the CO notified the Employer that its application for temporary labor certification under the H-2A temporary agricultural program was denied. AF-18-21. The denial letter noted that the Employer's positive recruitment report indicated that one applicant (Troy Brooks) was not hired because he did not have the required one month general farm work experience, while Brandon Meador was not hired "because he did not have experience with moving wheel-lines." The denial letter noted in regard to the rejection of Brandon Meador that "no such experience was listed in either the ETA Form 9142 or the ETA Form 790 as a requirement for employment." Therefore the application was denied. The CO also pointed out in the denial letter that he did not consider the rejection of Mr. Meador to be for a "lawful job related reason." The CO referred to the ETA Form 9142 which required one month experience with "general farm work/irrigation work" but did not require "experience with moving wheel lines." The CO also pointed out that ETA Form 790 item 15, states "Applicants must have one month experience as a General Farm Worker." Although working with wheel-lines is in the job description it was not listed as a prerequisite for employment. *Id*.

The CO further pointed out that ETA form 790 Item 16 states that "to meet minimum acceptable performance standards when irrigating, the worker must, after a ten day conditioning period, move an average of at least 48, 40 foot sections of 3 inch pipe or 44, 40 foot sections of 4 inch pipe per hour under normal working conditions." See AF – 73. The CO indicated that this implied that some learning of specific skills by the worker is expected in the first ten days of employment. For these reasons the CO denied the application.

On April 6, 2016, Employer's representative sent an email to the Chief Administrative Law Judge indicating that she wished to "challenge" the decision of the Chicago certifying officer. AF-2. Employer's appeal was referred to the U.S. Department of Labor, Office of Administrative Law Judges - Pittsburgh office on April 8, 2016 and subsequently assigned to the undersigned Administrative Law Judge. A Notice of Docketing and Order Directing Clarification was issued by the undersigned on April 8, 2016. On April 11, 2016 Employer's representative faxed a clarification of its appeal and indicated that Employer was requesting expedited administrative review under 20 C.F.R. §655.171(a).

The Administrative File was received by the undersigned on April 18, 2016. On that date an Order was issued notifying the parties that they could file written briefs with the undersigned.[2]

Employer's representative submitted a letter to the Chief Administrative Law Judge by fax on April 6, 2016, stating Employer's position regarding the CO's denial.[3] Employer argues that the one month required experience listed as "General Farm Experience/Irrigation," on the ETA Form 790 should be read to include the "ability to move and run wheel lines" which was one of the items listed in the job description found at 790 section 16 and ETA Form 9142. Employer further asserts that the decision to not hire Brandon Meador was not "solely based on the applicant having no wheel line experience" but rather because he "does not possess the skills to safely perform all duties as described in both the ETA 790 Section 16 and ETA form 9142, Section F." Employer also submitted the resume of Brandon Meador which had not been previously submitted to the CO to support Employer's decision to reject his application. Employer argues that his experience as a "logger by trade" supported their decision to not hire him because he has no "General Farm Work/Irrigation Experience."

To the extent that these statements or enclosures (Brandon Meador's resume) are offering any additional factual information in regard to the Employer's decision to not hire Brandon Meador, which was not submitted to the CO, or contained in the Employer's official "recruitment report," submitted to the CO, they will not be considered by the undersigned since this administrative review under 20 C.F.R. §655.171(a) is conducted based upon the written record established before the CO. Only the argument of the parties and the written record can be considered without consideration of any new evidence. *See* 20 C.F.R. §655.171(a).

Attorney Robert P. Hines of the U.S. Department of Labor Solicitor's office, Employment and Training Legal Services ("Solicitor") submitted a timely brief on April 22, 2016, on behalf of the CO. The Solicitor argues that the primary purpose of the H-2A regulations is to determine whether there are sufficient U.S. workers to perform the work for which the Employer wishes to import foreign agricultural workers. He contends that the Employer has not demonstrated in this case, that the domestic worker (Brandon Meador) who applied to the Employer was rejected for a lawful job related reason. In particular, the Solicitor argues the stated job qualifications or requirements for the position at issue do not include "experience with moving wheel lines," but rather only require one month of experience with general farm work/irrigation. The Solicitor points out that Form 790 Item 16 define the job requirements of the position, but not the required qualifications of the applicant. The Solicitor further argues that Employer's rejection of Mr. Meador because of a qualification not required on the job order is not a lawful job related reason for failing to hire the domestic worker. In support of his position the Solicitor cites as an example, *New York City Department of Education*, 2012-PER-03049 (Dec. 15, 2012). (In Permanent Alien Labor Certification case, the Board found that the rejection of a job applicant with a state teaching certification, on the basis that it was not in chemistry, was an unlawful rejection when the application required only a state

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[2] The deadline for briefs was extended to 1pm EST on Friday, April 22, 2016, with telephone notification to the parties' representatives on April 21, 2016.

[3] Employer's representative confirmed in a telephone call with the undersigned's legal assistant on April 21, 2016 that Employer would be relying on the argument in her April 6, 2016 statement and would not be filing an additional brief or position statement.

certification for qualification and not a more specific certification in chemistry). Thus the Solicitor contends that the CO's denial of this Temporary Labor Certification application should be affirmed.

ISSUE

The applicable Federal regulations at 20 C.F.R. §655.161(b) state that in making a determination as to whether there are insufficient U.S. workers to fill the employer's job opportunity, the CO will count as available any U.S. worker referred by the SWA (in this case the Montana State Workforce Agency) or any U.S. worker who applied directly to the employer, but who was rejected by the employer for other than a lawful job-related reason or who has not been provided with a lawful job-related reason for rejection by the employer. Thus the issue in this case is whether applicant Brandon Meador was rejected by the employer for a "lawful job-related reason" on the basis of information submitted to the CO.

SCOPE OF REVIEW

When an employer requests an expedited administrative review in a Temporary Labor Certification (TLC) case, the ruling of the administrative law judge must be based on the written record and any legal briefs from the parties involved or amici curiae. 20 C.F.R. § 655.171(a). The written submissions of the parties may not include new evidence. *Id.* The written decision must be issued within five business days after the administrative law judge received the administrative file. *Id.* In this matter, the undersigned received the administrative file on April 18, 2016. Therefore, the undersigned must issue a decision no later than April 25, 2016. In rendering a decision, the undersigned must take one of the following actions:

(1) affirm the CO's decision;
(2) reverse the CO's decision;
(3) modify the CO's decision, or
(4) remand to the CO for further action.

20 C.F.R. § 655.171.

APPLICABLE LAW

The H-2A visa program permits foreign workers to enter the United States to perform temporary or seasonal agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Employers seeking to hire foreign workers under the H-2A program must apply to the Secretary of Labor for certification that:

(1) sufficient U.S. workers are not available to perform the requested labor or services at the time such labor or services are needed, and

(2) the employment of a foreign worker will not adversely affect the wages and working conditions of similarly-situated American workers.

8 U.S.C. § 1188(a)(1); *see also* 20 C.F.R. § 655.101.

In order to receive temporary labor certification of a foreign worker, an employer must demonstrate that it has a "temporary" or "seasonal" need for agricultural services. 20 C.F.R. § 655.161. In addition the employer bears the burden of demonstrating that there are not sufficient U.S. workers that are able, willing, and qualified to perform the work in the area of intended employment. 20 C.F.R. §655.103(a). In this regard, the employer must cooperate with the SWA's efforts to recruit U.S. workers for the available job for which it is requesting a temporary foreign worker, and also provide proof that Employer has performed other positive recruitment steps that it is required to make, in compliance with the regulations at 20 C.F.R. §655.135(c). As proof of these positive recruitment efforts, the Employer is required to file with the Certifying officer a "written recruitment report." The certifying officer is required to consider as available for the position at issue, any U.S. worker who applies for the position, who is rejected by the employer for other than a lawful, job-related reason. See 20 C.F.R.§655.161(b).

DISCUSSION

By email dated March 24, 2016 Employer filed its "positive recruitment report" and notified the CO that it had interviewed three U.S. workers for the position. In this report Employer indicated that 1) Troy Brooks was not hired "because he did not have the required 1 month general farm work experience; 2) Brandon Meador was not hired "because he did not have experience with moving wheel-lines as defined in item 16 of the ETA form 790"; 3) Mike Moore was not hired "because [he] had found other employment." AF-28-30.

An expedited administrative review under 20 C.F.R. §655.171(a) is based on the written record developed before the CO as well as the argument of the parties without consideration of any additional evidence. Thus no additional evidence submitted with the Employer's April 6, 2016 request for review, which had not been submitted to the CO, will be considered in this review. With this in mind, the CO's denial of the employer's application is affirmed for the following reasons.

The Employer's recruitment report lists the reason for rejection of the application of Brandon Meador as "he did not have experience with moving wheel-lines as defined in item 16 of the ETA form 790." This rejection can be contrasted with the rejection of Troy Brooks who was rejected "because he did not have the required 1 month general farm work experience." The stated position in this case based on form ETA Form 9142A and ETA 790 is "general farm/irrigation worker." In regard to job requirements for the job, ETA Form 9142 A (F) indicates no education or job training is required. Employment experience of "1 month" is required in the occupation of "General farm worker/Irrigation worker." AF-62. ETA Form 790 Item # 15 states the following regarding Special Requirements/Qualifications: "Applicants must have 1 month experience as a general farm worker. It is further stated that "applicants hired must be able to obtain a valid Driver's License as driving on public roads may be required." AF-73. Other requirements listed on Form 790 at Item 16 are the following: "1) Driver requirements, 2) Extensive sitting, 3) Exposure to extreme temperature, 4) Lifting requirement, 5) Extensive pushing and pulling, 6) Extensive walking, and 7) Frequent stooping." AF-73.

The CO correctly noted that there is no mention on either ETA Form 9142A or ETA 790 of "experience with moving wheel lines." There are no other "qualification" or prerequisites listed on Form 9141A or Form 790 or the attachments to these forms other than those listed above.

The job duties and requirements of the positions as listed on Form 9142A Item 5 do not specify that experience in all of the job duties and requirements is a prerequisite of employment. The job duties and requirements state as follows:

> Worker will be required to perform a variety of duties related to the production of hay. General Farm Work will include the following responsibilities; gather and remove rocks from field; replace/repair fencing; operate motor bike or all-terrain vehicle in the course of performing duties; maintain, drive, attach and operate farm implements/tractors/equipment to till soil plant cultivate, fertilize and harvest crops; perform general cleanup of farm areas; herd livestock. Irrigation work will include the following: Hand lines: connect pipes; check alignment of pipe and adjust for proper water distribution attach lines to water supply; turn on pump turn valves to start flow of water; disassemble lines and carry pipes across fields at specified intervals; move pipes through freshly irrigated crops and/or plowed fields where mud may be deep.

The CO noted in his denial that ETA Form 790 Item 16 states that "to meet minimum acceptable performance standards when irrigating, **the worker must, after a ten day conditioning period**, move an average of at least 48, 40 foot sections of 3 inch pipe or 44, 40 foot sections of 4 inch pipe per hour under normal working conditions." (emphasis added). The CO correctly reasoned that this statement implies that some job training and learning of specific skills will take place in the first ten days of employment.

It should be pointed out that applicant Brandon Meador was not rejected because he did not have the required one month general farm work experience as was the applicant Troy Brooks. Brandon Meador was rejected for a different reason, that is, "because he did not have experience with moving wheel-lines." This was not listed as a prerequisite to employment. Further, based on the information in the record, it has not been established that Mr. Meador did not have the required one month experience in farm work/irrigation or its equivalent.

The CO was correct in determining that "wheel line experience" the basis for rejection of Brandon Meador's application for employment, was not listed on the ETA Form 790 or ETA Form 9142A as a prerequisite for employment. Accordingly, for this reason, the CO's denial of this application on the basis that Employer did not show that the rejection of Brandon Meador was for a lawful job-related reason is affirmed.

ORDER

Accordingly, it is **ORDERED** that the Certifying Officer's decision to deny Employer's *H-2A Application for Temporary Labor Certification* is **AFFIRMED.**

SO ORDERED.

Digitally signed by Richard Morgan
DN: CN=Richard Morgan,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=Pittsburgh, S=PA, C=US
Location: Pittsburgh PA

RICHARD A. MORGAN
Administrative Law Judge