



Issue Date: 29 May 2019

OALJ Case No.: 2019-TLC-00053
ETA Case No.: H-300-19013-933991

In the Matter of

E&A FARMING,
Employer

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188 and its implementing regulations at 20 C.F.R. Part 655, Subpart B. The temporary alien agricultural labor certification (“H-2A”) program permits employers to hire foreign workers to perform agricultural work within the United States on a temporary basis.

On May 10, 2019, E&A Farming (“Employer”) filed a request for administrative review of the final determination (“Request”) issued by the Certifying Officer (“CO”) in the above-captioned H-2A temporary alien labor certification application.¹ I received the Administrative File (“AF”) from the Employment and Training Administration on May 22, 2019. Pursuant to 20 C.F.R. § 655.171(a), this decision and order is based on the written record and is issued within five business days of the receipt of the AF.

STATEMENT OF THE CASE

On January 29, 2019, Employer filed an H-2A Application for Temporary Employment Certification on ETA Form 9142 (“Application”).² The Application requested certification for 31 “Farmworkers and Laborers, Crop, Nursery, and Greenhouse,” for Employer’s Los Alamos, California location for the period beginning

¹ In its Request, Employer stated as follows: “This letter is to ask to review the letter of denial that was received from the Department of Labor that request temporary agriculture workers under the H2A program.” Administrative File 1. I interpret that to mean Employer seeks administrative review in lieu of a de novo hearing under 20 C.F.R. § 655.171.

² AF 536-545.

May 1, 2019 and ending December 31, 2019.³ The CO issued a Notice of Deficiency on February 5, 2019, followed by multiple Minor Deficiency Emails and a Notice of Required Modification.⁴

On April 15, 2019, the CO issued a Notice of Acceptance (“NOA”) detailing the positive recruitment steps Employer had to complete prior to granting certification.⁵ Among other things, the NOA required Employer to publish advertisements locally (i.e. California) as well as in Oregon and Washington:

In order to receive a final determination on your temporary labor certification application, you are required to: ...

2. Accomplish the following positive recruitment steps ...

A. Placement of Newspaper Advertisements (20 CFR § 655.151(a)-(b)):

- a. Local Advertisements: Place an advertisement ... in a local newspaper of general circulation serving the area of intended employment[.]

C. Additional Positive Recruitment (20 CFR § 655.154): The [CO] has determined that there are a significant number of qualified U.S. workers, who, if recruited through the following methods, would be willing to make themselves available for work at the time and place needed in the following state(s): Oregon, Washington ... You must publish a newspaper advertisement in each of the States identified above.⁶

On that same date, the CO received from Employer a recruitment report dated January 18, 2019.⁷ The report contained “documentation in support of the approved application accepted for processing.”⁸ Several of those documents revealed that, in

³ AF 536, 539.

⁴ AF 304-317, 319-334, 350, 447, 527-531.

⁵ AF 259-264.

⁶ AF 259-262 (citations in original)

⁷ AF 209-258.

⁸ AF 209.

January 2019, Employer placed advertisements in newspaper publications located in California and Arizona.⁹

On April 16, 2019, the CO notified Employer of the following deficiencies and directed it to complete the necessary recruitment as outlined in the NOA and submit an updated recruitment report:

The recruitment report submitted by the employer is dated January 18, 2019. Furthermore, the recruitment report states the advertisements were run in January. However, the Chicago NPC issued a Notice of Acceptance (NOA) to the employer on April 15, 2019.

As outlined in Item 2 of the NOA the employer is directed to "Accomplish the following positive recruitment steps on your own between now" (April 15, 2019) "and the expected date on which any foreign workers will depart for your place of employment, or three days prior to the expected start date of employment, whichever occurs first." (20 CFR 655.143(3)(b))¹⁰

On that same date, the CO received from Employer an "updated" recruitment report. However, while the report's cover letter was dated April 15, 2019, the supporting documentation was the same Employer submitted in its initial recruitment report, including the same January 2019 advertisements published in California and Arizona newspapers.¹¹ The CO issued another deficiency email on April 17, 2019;

Although the employer re-dated the cover letter to April 15, 2019; the employer submitted the same recruitment report which is dated January 18, 2019 and signed by the employer on January 21, 2019. Furthermore, the recruitment report still states the advertisements were run in January.¹²

On April 23, 2019, Employer submitted another updated recruitment report.¹³ This report contained documentation revealing Employer placed additional advertisements in an Arizona newspaper on April 23-26, 2019.¹⁴

On May 3, 2019, the CO determined, *inter alia*, that Employer failed to demonstrate that it completed the required positive recruitment steps as detailed in the

⁹ AF 214-219.

¹⁰ AF 207-208 (citations and quotations in original).

¹¹ AF 156-206.

¹² AF 156.

¹³ AF 107-155.

¹⁴ AF 110, 112-114.

NOA and, therefore, denied the Application.¹⁵ Specifically, the CO found that Employer failed to advertise locally and failed to place advertisements in Oregon and Washington newspapers: “the local advertisements were published prior to the issuance of the NOA letter” and Employer “failed to place advertisements in the required states of Oregon and Washington.”¹⁶

On May 10, 2019, Employer filed its Request.¹⁷ The Request contained the following arguments:

After reviewing and going through every point in the [CO’s] denial letter the following points have been found:

- As shown in Exhibit 1; there are two separate dates where recruitment was advertised, one being a Sunday; demonstrating the unsuccessful turn around in employing insufficient workers for the agricultural period of need. On the denial letter underlines the same recruitment report and re-dated. The same process for recruitment was done on the re-dated letter.
- As shown in Exhibit 1; the receipts of advertisement are attached as well as a sample of the actual newspaper advertisements; unfortunately, due to a limit in characters per ad our company was only able to address six of the eleven points requested
- As shown in Exhibit 3; former U.S workers were contacted by postal mail; attached is a sample letter signed by myself; Point C, in the notice of Acceptance refers to publishing in Oregon and Washington as additional recruitment; advertisement for Casa Grande Valley was published in a neighboring state, Arizona, other than California.
- Due to the fact that day by day a new correction or change of wording required by the DOL, we had revised and corrected everything they have asked for but by the time this is being done a new requirement has to be updated. We have been complying with everything we have been asked for and complying with the legal steps we need to take to get this

¹⁵ AF 11-15.

¹⁶ AF 11.

¹⁷ AF 1-10.

process completed and get the labor help we urgently need to harvest our product.¹⁸

DISCUSSION

The scope of review in H-2A cases is limited. I may consider only the written record and any written submissions from the parties, which may not include new evidence.¹⁹ The standard of review is de novo. That is, I may affirm the denial of certification only if the basis stated by the CO for the denial is legally and factually sufficient in light of the written record provided.²⁰

To be eligible for the H-2A program, an Employer must comply with all of the provisions contained in 20 C.F.R. Part 655, Subpart B,²¹ including 20 C.F.R. §§ 655.151 and 655.154. Those sections are contained in the “Post-Acceptance Requirements” section of Subpart B, and provide in pertinent part:

§ 655.151 Newspaper advertisements.

(a) The employer must place an advertisement ... in a newspaper of general circulation serving the area of intended employment[.]

§ 655.154 Additional positive recruitment.

(a) Where to conduct additional positive recruitment. The employer must conduct positive recruitment within a multistate region of traditional or expected labor supply where the CO finds that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed.

As previously stated, the NOA instructed Employer to accomplish several positive recruitment steps “between now [April 15, 2019] and the expected date on which any foreign workers will depart for your place of employment, or three days prior to the expected start date of employment, whichever occurs first.”²² Two of those required steps were to publish advertisements locally (i.e. California) pursuant to 20 C.F.R. § 655.151(a), and to publish advertisements in the states of Oregon and

¹⁸ AF 1. The “Exhibits” Employer references and enclosed in his Request are not new evidence, but rather are documents that were already part of the AF.

¹⁹ 20 C.F.R. § 655.171(a).

²⁰ The regulation is silent as to the appropriate standard of review to be applied on administrative review of a CO’s decision. See 20 C.F.R. § 655.171(a). I find persuasive the rationale articulated in *Crop Transport, LLC*, 2018-TLC-00027, slip op. at 3 (Oct. 19, 2018), concluding that de novo review, as opposed to an arbitrary and capricious standard, is appropriate on administrative review under 20 C.F.R. § 655.171(a).

²¹ 20 C.F.R. § 655.161.

²² AF 260.

Washington pursuant to 20 C.F.R. § 655.154(a).²³ Employer failed to accomplish those steps.

The local advertisements Employer submitted were all published in California newspapers *prior to* the issuance of the NOA. Specifically, the only local advertisements Employer submitted were published in January 2019.²⁴ However, the NOA was clear that positive recruitment was to be done on or after April 15, 2019 and, indeed, the provision requiring local advertising upon which the CO relied, 20 C.F.R. § 655.151(a), is contained in the “*Post-Acceptance Requirements*” section of Subpart B.

Further, the record does not contain any evidence showing that Employer published advertisements in any Oregon or Washington newspapers. The CO determined under 20 C.F.R. § 655.154(a), that there were a significant number of qualified U.S. workers in Oregon and Washington and, as such, directed Employer to conduct positive recruitment within those states. However, Employer instead chose to publish advertisements in the neighboring state of Arizona.²⁵

Based on my review of the AF and Employer’s written submissions, I find that Employer failed to comply with 20 C.F.R. §§ 655.151 and 655.154. Accordingly, Employer does not meet the criteria for certification.²⁶

ORDER

For the reasons stated above, the denial of Employer’s H-2A Application for Temporary Employment Certification is **AFFIRMED**.

SO ORDERED.

THEODORE W. ANNOS
Administrative Law Judge

Washington, DC

²³ AF 260, 262.

²⁴ AF 110, 115-116, 160, 160-167, 212, 218-219.

²⁵ AF 110, 112-114, 160, 162-165, 212, 214-217.

²⁶ 20 C.F.R. § 655.161.