U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 April 2020

OALJ Case No.: 2020-TLC-00063

ETA Case No.: H-300-20014-252298

In the Matter of:

RIEHM PRODUCE FARM, LLC,
Employer.

Certifying Officer: John Rotterman, Chicago National Processing Center

DECISION AND ORDER AFFIRMING DENIAL

This case arises from Riehm Produce Farm, LLC's (Employer) request for administrative review of the Certifying Officer's (CO) decision to deny an application for temporary alien labor certification under the H-2A non-immigrant program. The H-2A program permits employers to hire foreign workers to perform temporary agricultural work within the United States on a temporary or seasonal basis, as defined by the United States Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H))(ii)(a); 20 C.F.R. Part 655, Subpart B. Employers who seek to hire foreign workers under this program must apply for and receive labor certification from the United States Department of Labor using a Form ETA-9142A, *H-2A Application for Temporary Employment Certification*. A CO in the Office of Foreign Labor Certification ("OFLC") of the Employment and Training Administration reviews applications for temporary labor certification. If the employer receives an unfavorable determination, the employer may request administrative review before the Board of Alien Labor Certification Appeals (BALCA). 20 C.F.R. § 655.171(a). For the reasons set forth below, the CO's denial of Employer's application is affirmed.

Statement of the Case

Employer filed an application for temporary employment certification on January 21, 2020, requesting certification for 7 Farmworkers/Laborers. AF 100-119. On January 27, 2020, the CO issued a Notice of Acceptance. AF 73-78. In relevant part, the Notice advised Employer:

> You are authorized conditional entry into the interstate clearance system based upon your written request and any assurances that your housing will meet Department of Labor standards at the same time your recruitment report is due. Housing must be provided to those workers who are not reasonably able to return to their permanent residence at the end of the work day, without charge to the worker. The housing must comply with the applicable housing standards

as set forth in Departmental regulations at 20 CFR 655.122(d). Please note that the employer provided housing must be physically located in the United States in order for the SWA [State Workforce Agency] to conduct a housing inspection. Employer provided housing located outside of the United States will not be acceptable. If not done so already, the SWA will make every effort to schedule and complete a pre-occupancy inspection of your housing and promptly notify you of any deficiencies that must be corrected.

AF 76. On April 1, 2020, the CO issued a denial letter. AF 50-53. The CO wrote:

> On January 22, 2020 the Chicago NPC sent correspondence to the Ohio State Workforce Agency (SWA) requesting the results of the employer's housing inspection. The SWA informed the Chicago NPC that " ... we need a lease agreement and a housing checklist from the employer which I had asked for immediately after receiving the 790 and have heard nothing at all back. I have just emailed again."
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> On January 24, 2020 the Ohio SWA further explained that since the employer's "leased housing will have more than 4 occupants, Ohio requires an Agricultural Labor Camp inspection to be completed as well as the previously mentioned documentation I have informed them of this on two separate occasions dating back to 1/14/2020 and have yet to hear back." On February 11, 2020, the SWA informed the Chicago NPC that the agent had provided the lease agreement.
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> On February 18, 2020, the SWA provided an update stating that the inspector is having trouble getting the employer to submit the proper housing information. On February 22, the SWA stated: "The employer is waiting for water test results. Looks to be about 2 weeks until completion."
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> In subsequent correspondence received on March 20 and March 23, 2020 the SWA informed the Chicago NPC that
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> > This grower is on a well and we need OEPA's approval for the well before we can approve the ALC plan review. It appears that OEPA will not be granting approval until their required water tests are completed and that appears to be in May. We asked about an alternate water source being allowed but were told no.
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> The Chicago NPC sent follow-up correspondence to the SWA for clarification regarding the length of time needed for the water test. In its response the SWA states:
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> > OEPA requires extensive testing for a well to be a public water system (PWS). There is a requirement for heavy metal testing that takes so much time (multiple samples over a couple months is the requirement for that). Mr. Riehm was told about getting this approval a long time ago and has been dragging his feet. Additionally, he operated an ALC last year without approval and we caught him at the end of the season so we are trying to get him into full compliance.
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> The employer has not provided housing accommodations in accordance with Departmental regulations at 20 CFR § 655.122(d)(1)(i). Therefore, the employer's H-2A application for seven (7) Farmworker and Laborer, Crop job opportunities is denied.

AF 52-53. On April 3, 2020, Employer filed a request for administrative review with attached documents. AF 1-48. Employer wrote:

> We now come before you asking for an appeal in this case. John Riehm of Riehm produce farm inc.
>
> As we are denying these allegation's
>
> On jan,27th 2020 this office responded to the request of the swa office. As we sent the documents as requested and in timely manner. An e copy was sent to Tlc and the SWA office. We explained to swa office in email that this was a more time-consuming analysis of the well. As far as Mr Riehm operating illegally last year we highly doubt this as we have been the agent for john Riehm for 5 years and has received full certification each year for up to 5 workers in this same housing. The rule is that if you have MORE than 5 workers you housing would need to be permitted as a labor camp.
>
> The water test had been completed and uploaded on 31st of march the denial letter which is date 04/01/2020 please see all supporting documents included here

AF 2. The case was docketed with BALCA on April 9, 2020 and assigned to me the following day. Counsel for the CO filed a brief urging affirmance on April 14, 2020.

Discussion

"Where the employer has requested administrative review … the [administrative law judge] will, on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae, either affirm, reverse, or modify the CO's decision, or remand to the CO for further action." 20 C.F.R. § 655.171(a).

Employer bears the burden of establishing entitlement to certification at all relevant times. *MacFarlane Pheasants, Inc. (Missouri)*, 2020-TLC-00060 (April 13, 2020). Here, the CO denied Employer's application for failing to meet its housing obligations.

Section 655.122 of the regulations enumerates the required contents of the job offer. Among them, the employer is obligated to "provide housing at no cost to the H-2A workers and those workers in corresponding employment who are not reasonably able to return to their residence within the same day." 20 C.F.R. § 655.122(d). In its application, Employer indicated it was providing a "Wood Frame House," with a maximum capacity of 10 residents, to house its workers. AF 109. Section 655.122(d)(1)(i) governs employer-provided housing; it states in full:

> Employer-provided housing must meet the full set of DOL Occupational Safety and Health Administration (OSHA) standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable under § 654.401 of this chapter. Requests by employers whose housing does not meet the applicable standards for conditional access to the

> interstate clearance system, will be processed under the procedures set forth at § 654.403 of this chapter[.]

20 C.F.R. § 655.122(d)(1)(i). It is not clear from the record which standards apply. Regardless, both require the employer to supply its employees with water that meets state water quality standards. *See* 29 C.F.R. § 1910.142(c)(1); 20 C.F.R. § 654.405(a).

According to the CO, the Ohio State Workforce Agency advised it needed the Ohio Environmental Protection Agency's approval before it could approve the Agricultural Labor Camp plan. The Ohio Environmental Protection Agency needed to conduct "extensive testing," including heavy metal testing, that likely would not be completed until May. Shortly thereafter, the CO issued the denial letter.

Along with its request for administrative review, Employer has submitted a number of documents that appear to be water quality reports. Even if I were permitted to review this new evidence, which I am not, *see* 20 C.F.R. § 655.171(a), Employer has not established that its water supply received approval from the appropriate state authority. Accordingly, the CO's denial of Employer's application for temporary labor certification will be affirmed.

ORDER

Based on the foregoing, IT IS ORDERED that the CO's denial of Riehm Produce Farm LLC's application for H-2A certification is AFFIRMED.

I am requesting that this order be served on the Office of the Solicitor at ETLS-OALJ-Litigation@dol.gov, the Employer and its agent at philreihm@gmail.com and ric.farmworkersh2a@gmail.com, and the Office of Foreign Labor Certification at both tlc.chicago@dol.gov and oflc.interagency@dol.gov.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ/PML
Newport News, Virginia