

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 22 January 2021

BALCA CASE NO.: 2021-TLC-00054

ETA Case No.: H-300-20352-967125

In the Matter of:

SUNSET HILLS VINEYARD LLC,
Employer.

**DECISION AND ORDER AFFIRMING THE NOTICE OF DEFICIENCY AND
REMANDING THE MATTER FOR FURTHER PROCESSING**

This matter arises under the labor certification program for temporary agricultural labor or services in the United States under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart B. This program, commonly referred to as the H-2A program, allows employers to hire foreign workers to perform agricultural labor in the United States on a temporary basis.

Sunset Hills Vineyard LLC (“Employer”) applied for authorization to hire eight temporary workers under the H-2A program. The Certifying Officer in the Office of Foreign Labor Certification issued a Notice of Deficiency. Employer then appealed the issuance of the Notice of Deficiency and requested review by an administrative law judge. The matter is now properly before the Board of Alien Labor Certification Appeals (the “Board” or “BALCA”) pursuant to Section 655.171 for review of the Certifying Officer’s Notice of Deficiency.¹ Upon a review of the record and the relevant legal authority, the undersigned **AFFIRMS** the determination of the Certifying Officer to issue the Notice of Deficiency and **REMANDS** this matter to the Office of Foreign Labor Certification for further processing.

I. Procedural and Factual Background

Employer is a Virginia company engaged in the operation of vineyards for wine production. (Administrative File “AF” at 69, 80.) Employer filed an Agricultural and Food Processing Clearance Order, Form ETA-790 with the Commonwealth of Virginia, as required by

¹ The chief administrative law judge may designate a single member or a three member panel of the Board to consider a particular case. 20 C.F.R. § 655.171. Chief Judge Henley designated a single member of the Board to hear this appeal.

20 C.F.R. § 655.121(a).² (AF, at 188.) Virginia did not accept the application and issued a Notice of Deficiency of Job Order on December 24, 2020. (AF, at 185-87.) This Notice of Deficiency of Job Order stated that the application failed to comply with 20 C.F.R. § 655.122(b) because the listed job qualifications in the application were not consistent with normal work qualifications for employers that do not employ H-2A workers in the same occupation. (AF, at 187.) Specifically, Virginia found that “[a]ccording to the findings from the 2019 and 2020 Virginia Prevailing Practice surveys in the Winchester federal crop reporting area, it is not normal or common practice for non-H2A employers to require experience when hiring seasonal farmworkers for the production of grapes.” (Id.) Virginia required Employer to amend its job order to remove the three month experience requirement or present evidence that it is normal for employers that do not employ H-2A workers in their vineyards in the Winchester crop reporting area to require three months of experience. (Id.)

Virginia issued a Notice of Denial on December 28, 2020. (AF, at 183-84.) This Notice of Denial found that Employer failed to satisfy its burden of demonstrating that it is normal and accepted for employers not employing H-2A vineyard laborers in the Winchester area to require experience. (AF, at 184.)

Employer then submitted an H-2A Application for Temporary Employment Certification with the United States Department of Labor seeking certification for eight seasonal vineyard workers. (AF, at 63, 71.) The stated temporary need for the workers is that the work is seasonal in nature. (AF, at 63.) The H-2A application was based on a stated seasonal need from March 1, 2021, through November 1, 2021. (AF, at 71.)

The SOC Occupational Code listed on the application was 45-2092.00. (AF, at 64.) The corresponding SOC Occupational Title listed was Farmworkers and Laborers, Crop, Nursery, and Greenhouse. (Id.) The application described the need for a total of eight H-2A workers working in Purcellville, Virginia. (AF, at 71-2.)

Employer specified the minimum qualifications in its application. (AF, at 72.) These qualifications included three months of work experience. (Id.) The application further described the nature of the work experience as follows:

This job requires a minimum of 3 months of verifiable agricultural experience working in a vineyard handling both manual and mechanized tasks including pruning, thinning and harvesting activities associated with production of grapes. Workers must be able to perform manual and mechanized task with accuracy and efficiency. Saturday work required. Must be able to lift/carry 60 lbs.

² Prior to filing an application for certification with the Department of Labor, an employer must submit a job order to the State Workforce Agency (“SWA”) serving the area of intended employment. 20 C.F.R. § 655.121(a). A job order is “[t]he document containing the material terms and conditions of employment that is posted by the State Workforce Agency . . . on its inter- and intra-state job clearance systems based on the employers . . . Form ETA-790” 20 C.F.R. § 655.103.

(AF, at 72.) These positions do not have an education or training requirement, but the position does require the ability to lift sixty pounds and has additional physical and environmental demands. (Id.) The wage offered for the position is \$12.67 an hour. (AF, at 71.)

As part of the work duties, the individuals will mow, cut, and weed fields, perform ditching, prepare the ground, thin fruit and remove shoots and vines, and perform vineyard maintenance. (AF, at 80.) This vineyard maintenance includes installing and maintaining vine trellises and tying the vines to the trellises. (Id.) In addition, the individual:

[m]ust possess the requisite skills and knowledge of what, when, where and how much to prune on a grape vine. Identify and remove the proper canes and vines while retaining the fruiting wood and renewal spurs. Must demonstrate and consistently utilize pruning practices that assure vine balance and preserve vine health. Manage vineyard canopy management to permit light and air circulation.

(Id.)

In support of the three month experience requirement in its application, Employer submitted a letter to the Office of Foreign Labor Certification challenging the validity of the Virginia survey results and setting forth evidence that justifies the experience requirement. (AF, at 93-97.)

The evidence submitted by Employer with its application included a list of vineyard operations in the crop reporting area to highlight the limited reach of the survey (AF 98-100), the results from the survey responses at issue (AF 102-119), letters from a viticulture professor at Virginia Tech and the Director of the Alson H. Smith Jr. Agricultural Research Center addressing the experience requirement (AF 121-123), and articles regarding the experience and care needed for the pruning and training of grapevines in a vineyard (AF 125-179).

Upon a review of the application, the Office of Foreign Labor Certification issued a Notice of Deficiency on January 4, 2021.³ (AF, at 4-7.) The Notice of Deficiency cited a single deficiency - Job Qualifications and Requirements. (AF, at 6-7.) The Certifying Officer found that “employer’s [experience] requirement exceeds the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops, as reported in surveys provided by the Virginia SWA.” (AF, at 6.) In finding that the three month experience requirement was not normal and common for non-H-2A employers of vineyard farm workers in the relevant area, the Certifying Officer first discussed the results from the 2019 and 2020 surveys, which contained a total of 12 responses. (Id.) Nine of the twelve employers stated that they do not require experience, while three require experience ranging from twenty-four months to two-three months. (Id.)

³ The record contains both the Notice of Deficiency of Job Order from Virginia and the Notice of Deficiency from the Certifying Officer. Any reference to Notice of Deficiency in this decision is to the notice from the Certifying Officer at the Office of Foreign Labor Certification. The undersigned has referred to the notice from Virginia as the Notice of Deficiency of Job Order.

The Certifying Officer then addressed the two letters submitted by Employer and explained that the letters “do not demonstrate that the employer’s three-month experience requirement is consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations. (AF, at 6-7.) The Certifying Officer also addressed the numerous articles and research submitted by Employer regarding the pruning of grape vines and explained that it did not sufficiently demonstrate that three months of experience was a normal qualification in the relevant area. (AF, at 7.) In finding that the documentation submitted by Employer was not sufficient, the Notice of Deficiency explained that:

Many of the highlighted sections in the research exhibit state that people can learn and practice pruning grapevines and that proper pruning and harvesting should be practiced and demonstrated to workers, which can be established in a trial and/or introductory period that the employer can provided based on its application including an (sic) trial period for up to five days. Additionally, the research provided is heavily focused on grapevine pruning, which is not the only objective the farmworker will be doing throughout the dates of need

(Id.) Finally, the Notice of Deficiency specified that “further documentation is needed to establish the employer’s three-month experience requirement as normal and accepted among non-H-2A employers in the same or comparable occupation or crops.” (Id.)

Employer immediately appealed the Notice of Deficiency to the chief administrative law judge. (AF, 1-2.) The case was then assigned to the undersigned on January 6, 2021. Employer confirmed by correspondence dated January 7, 2021, that it sought an administrative review of the Notice of Deficiency and not a *de novo* hearing.

Slater Run Vineyards, LLC, 2021-TLC-00060, another case involving a notice of deficiency where an employer had a three month experience requirement, was filed approximately a week later. The case was initially assigned to Judge Lauren Boucher. Employer then requested that Slater Run Vineyards be consolidated with this matter with the undersigned. Accordingly, Judge Boucher transferred Slater Run Vineyards to the undersigned. Because the administrative records are different in the two cases, the undersigned did not consolidate the cases and has issued two separate decisions.

The undersigned received the administrative file in this matter on January 21, 2021. Pursuant to 20 C.F.R. § 655.171(a), the undersigned has reviewed the entirety of the administrative file and issued this decision within five business days of receipt of the administrative file, as required by the regulations.

II. Legal Standard

The H-2A program allows an employer to temporarily bring nonimmigrant workers into the United States to perform “agricultural labor or services, as defined by the Secretary of Labor. . . .” 8 U.S.C. § 1101(a)(15)(H). One of the fundamental purposes of the H-2A program is to provide employers in the United States with temporary, foreign agricultural laborers where the employer can demonstrate that there are not sufficient U.S. workers able to perform the work

needed. 20 C.F.R. § 655.103(a). To qualify for the H-2A program, the employer must show that bringing in the requested number of foreign workers to perform the work will not adversely affect the wages and working conditions of similarly employed U.S. workers. 20 C.F.R. § 655.103(a).

The certifying officer reviews an employer's application for temporary employment certification or job order to ensure that they comply with the program's requirements. 20 C.F.R. § 655.140(a). If the certifying officer determines that the application or job order is "incomplete, contain errors or inaccuracies, or do not meet the requirements" set forth in the regulations, the certifying officer issues a notice of deficiency to the employer. 20 C.F.R. § 655.140(a). The notice of deficiency must set forth the reason why the application or job order fails to meet the criteria for acceptance. 20 C.F.R. § 655.140(b)(1). In addition, the notice of deficiency must allow the employer an opportunity to submit a modified application or job order within five business days and must specify what modification the employer must make in order for the certifying officer to issue a notice of acceptance. 20 C.F.R. § 655.140(b)(2). Accordingly, the regulations allow an opportunity for an employer to cure any stated deficiency prior to a final denial. See 20 C.F.R. § 655.140.

However, upon receipt of a notice of deficiency, the regulations also allow an employer to seek expedited administrative review before an administrative law judge of a notice of deficiency. 20 C.F.R. § 655.141(c). Where an employer requests administrative review of the certifying officer's decision – as opposed to seeking a de novo hearing - the administrative law judge shall make his or her decision based on the written record, including any new submissions by the parties. 20 C.F.R. § 655.171(a). But these new submission are limited to legal argument; neither party may submit new evidence for consideration where the employer requests an administrative review pursuant to Section 655.171(a). Id.

After review, the administrative law judge may either affirm, reverse, or modify the decision of the certifying officer, or remand the matter to the certifying officer for further action. Id. The administrative law judge must specify the reasons for his or her determination in a written decision, which must be issued within five business days of receipt of the administrative law judge's receipt of the administrative file. Id.

III. Analysis

The job qualifications contained in an employer's job offer "must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations and crops." 20 C.F.R. § 655.122(b). In reviewing the application, the certifying officer can require that the employer submit documentation substantiating the appropriateness of the job qualifications the employer specifies in the job offer. Id.

Here, the Certifying Officer found that that the three month experience requirement contained in Employer's application exceeds the normal accepted work qualifications required by non-H-2A employers in the same occupation. (AF, at 6-7.) The Certifying Officer relied on the survey results from the 2019 and 2020 surveys conducted by the Virginia SWA to reach the decision that no experience was normal for the category of workers sought by Employer. (Id.) In

addition, the Certifying Officer noted that pursuant to the H-2A Program Handbook, a formal survey was not necessary, and that the burden of proof rests with an employer to justify the acceptability of occupational qualifications that differ from the SWA and the Chicago National Processing Center. (Id.) The Certifying Officer also explained how the evidence submitted by Employer – including the letters and documents related to pruning vines - failed to satisfy its burden.

Unlike the situation in Slater Run Vineyards, the Certifying Officer in this case addressed and considered Employer’s evidence and explained why such evidence failed to satisfy its burden to demonstrate that it is normal for employers who do not utilize H-2A vineyard laborers to hire workers with three months of experience. While Employer’s evidence clearly establishes the advantage to hiring workers with experience to perform tasks such as pruning, the Certifying Officer’s determination that the evidence failed to demonstrate that the experience requirement is normal in the relevant community is not arbitrary, capricious, or an abuse of discretion.⁴ Moreover, as the Certifying Officer correctly points out in the Notice of Deficiency, the stated job duties for the requested H-2A workers include numerous job duties in addition to pruning grape vines. (AF, at 7, 80.) These job duties including mowing, weeding, ditching, hauling, clearing debris, and physically transporting the grapes; duties that would not require any experience related to the pruning of grape vines. (AF, at 80.)

While the record before the undersigned is clear that three months of vineyard experience is preferred for individuals engaged in tasks such as pruning and trellising and would benefit Employer, Employer must demonstrate that it is normal for employers not employing H2-A vineyard laborers to hire people with some experience. For example, Employer could submit documentation from the other vineyards on the list contained in the record that such employers require experience for new hires. Employer could submit local or online job advertisements for the relevant area containing experience requirements. In light of the limited nature of the 2019 and 2020 surveys, Employer’s burden should not be difficult to satisfy if other vineyards in this region of Virginia do require vineyard workers to have some experience.

Upon a review of the administrative record, the undersigned **AFFIRMS** the Notice of Deficiency and **REMANDS** this matter to the Office of Foreign Labor Certification for further processing.

⁴ Although at first blush it may appear that this determination conflicts with the undersigned’s decision in Slater Run Vineyards, the Notice of Deficiency in this case, unlike in Slater Run Vineyards, explains why Employer’s evidence was insufficient to satisfy its burden. Unlike in Slater Run Vineyards, no *post hoc* rationalization or explanation is needed, and the undersigned can conduct a meaningful review of the Certifying Officer’s decision to issue the Notice of Deficiency.

IV. Conclusion

The undersigned **AFFIRMS** the Notice of Deficiency and **REMANDS** this matter to the Office of Foreign Labor Certification for further processing consistent with this Decision and Order.

SO ORDERED.

STEWART F. ALFORD
Administrative Law Judge