



**U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

RE: WESTERN RANGE ASSOCIATION'S REQUEST FOR EXPEDITED ADMINISTRATIVE-JUDICIAL REVIEW OF THE DENIAL BY REGIONAL ADMINISTRATOR JESS C. RAMAKER OF TWO TEMPORARY LABOR CERTIFICATION APPLICATIONS: 78-TLC-137 & 138.

ON AUGUST 16, 1978, THE UNDERSIGNED HEARING OFFICER OF THE U.S. DEPARTMENT OF LABOR WAS ASSIGNED TO REVIEW, UPON REQUEST BY WESTERN RANGE ASSOCIATION, THE RECORDS OF THE DENIALS OF TWO TEMPORARY LABOR CERTIFICATION APPLICATIONS. THE APPLICATIONS WERE FILED BY THE ASSOCIATION, AS JOINT EMPLOYER WITH SULPHUR CREEK LIVESTOCK AND ARKOOSH AND ZIDAN, INC., ON JULY 18 AND JULY 14, 1978, RESPECTIVELY. THE PERTINENT CASE FILES WERE RECEIVED IN THIS OFFICE ON AUGUST 21, 1978.

ON AUGUST 11, 1978, REGIONAL ADMINISTRATOR JESS C. RAMAKER DENIED THE APPLICATIONS ON THE GROUNDS THAT THEY WERE NOT TIMELY FILED; THEY DO NOT INCLUDE THE ASSURANCES REQUIRED BY 20 CFR 655.203. AND THAT THE JOB OFFERS DO NOT INCLUDE ALL THE PROVISIONS REQUIRED BY 20 CFR 655.202. WESTERN RANGE ASSOCIATION WAS NOTIFIED OF THE OPPORTUNITY TO SEEK REVIEW OF THE DENIALS WITHIN 5 CALENDAR DAYS OF THE NOTICE OF THE DENIALS, AS PROVIDED IN 20 CFR 655.204(d). THE ASSOCIATION WAS ALSO AFFORDED THE OPPORTUNITY TO AMEND THE APPLICATION WITHIN 5 CALENDAR DAYS OF THE NOTICE OF DENIALS.

WESTERN RANGE ASSOCIATION REQUESTS THAT THE DENIALS BE SET ASIDE AND THAT THE REGIONAL ADMINISTRATOR BE DIRECTED TO APPROVE THE APPLICATIONS EFFECTIVE NO LATER THAN 60 DAYS FOLLOWING THE DATE OF THEIR FILING, IT ARGUES (1) THAT THE DEFECTS LISTED IN THE NOTICE OF DENIALS HAD BEEN REMEDIED PRIOR TO THE DENIALS: (2) THAT THE NOTICE OF DENIAL IS DEFECTIVE AS TO FORM, SO AS TO BE MISLEADING, AND IS AMBIGUOUS AS TO ITS DATE, SO AS TO DENY A MEANINGFUL RIGHT OF APPEAL; (3) THAT THE FORMS PROVIDED BY THE U.S. DEPARTMENT OF LABOR AND STATE EMPLOYMENT SERVICE FOR USE UNDER 20 CFR 655 ARE MISLEADING IN THAT THEY DO NOT CALL FOR THE ASSURANCES AND JOB OFFER CONTENTS REQUIRED BY THE REGULATION; (4) THAT THE DENIALS ARE VOID BECAUSE

THEY ARE UNTIMELY UNDER 20 CFR 655.204(c), AND MOREOVER, ARE AN ABUSE OF DISCRETION PROVIDED THEREIN; AND (5) THAT THE DENIALS CONSTITUTE A DELIBERATE HARASSMENT OF THE ASSOCIATION, IN THAT IT HAD REACHED AN AGREEMENT WITH COUNSEL FOR THE EMPLOYMENT AND TRAINING SERVICE TO THE EFFECT THAT IF 'THE ASSOCIATION PERFORMED CERTAIN ACTIONS DENIALS OF THE TYPE INVOLVED HEREIN WOULD BE AVOIDED; THE ASSOCIATION HAS PERFORMED ITS UNDER- TAKING: NONETHELESS, THE DENIALS WERE MADE.

I. IT IS NOTED THAT THE ASSOCIATION DOES NOT DENY THAT THE APPLICATIONS, AS ORIGINALLY FILED, ARE DEFICIENT. BUT IT CONTENDS THAT THE DEFICIENCIES WERE CURED. THE UNDERSIGNED CANNOT AGREE. 20 CFR 655.212 REQUIRES THE REVIEW OF THE DENIALS TO BE MADE ON THE BASIS OF THE WRITTEN RECORD. ONLY THE CASE FILE FOR ARKOOSH AND ZIDAN, INC., CONTAINS A LETTER, DATED JULY 11, 1978, FROM WESTERN RANGE ASSOCIATION TO "ES, LO". THE LETTER STATES THAT THE ASSOCIATION AGREES TO BE JOINTLY AND SEPARATELY LIABLE WITH ITS EMPLOYER- . . MEMBERS FOR COMPLIANCE WITH THE OBLIGATIONS SET FORTH IN SUBPART C OF 20 CFR PART 655. APPARENTLY THE REGIONAL ADMINISTRATOR IS OF THE VIEW THAT THE LETTER DOES NOT HAVE THE EFFECT OF CURING THE DEFECTS POINTED OUT IN THE NOTICE OF DENIALS, AND IT IS FELT THAT HE IS RIGHT. ALTHOUGH THE LETTER MIGHT BE CONSTRUED SO AS TO SATISFY THE REQUIREMENTS OF 20 CFR 655:203 CONCERNING FUTURE COMPLIANCE WITH APPLICABLE LAWS AND FUTURE RECRUITMENT EFFORTS, IT IS NOT UNREASONABLE FOR THE REGIONAL ADMINISTRATOR TO INSIST THAT THE ASSURANCES BE MADE WITH THE REQUIRED SPECIFICITY. MOREOVER, THE. LETTER DOES NOT GO TO THE QUESTION OF TIMELINESS, NOR DOES IT SUPPLY THE MISSING STIPULATIONS WHICH MUST BE INCLUDED IN THE JOB OFFER SO THAT THEY MAY BECOME PART OF THE WORK CONTRACT WITH THE WORKER, AND THE WORKER MAY HAVE NOTICE OF THEM AND ENFORCE THEM CONTRACTUALLY, THERE IS .NOT SUCH LETTER IN THE RECORD FILE FOR SULPHUR CREEK LIVESTOCK, AS FOR THE CONTENTION OF HARASSMENT, IT IS NOT BORNE OUT BY THE RECORD. THE CASE FILES DO NOT REVEAL THE AGREEMENT RELIED ON BY WESTERN RANGE ASSOCIATION, NOR THE ALLEGED PERFORMANCE ON ITS PART.

II. THE UNDERSIGNED AGREES WITH WESTERN RANGE. ASSOCIATION THAT THE NOTICE OF DENIALS IS MISLEADING. THE PROBLEM IS THAT THE 5-DAY PERIOD ALLOWED FOR AMENDMENT OF THE APPLICATIONS WAS MADE TO RUN CONCURRENTLY WITH THE 5-DAY PERIOD IN WHICH REVIEW OF THE DENIALS MUST BE SOUGHT. IF THE ASSOCIATION REQUESTS REVIEW WITHOUT AMENDING THE APPLICATIONS IT FORFEITS THE OPPORTUNITY TO AMEND. IF THE ASSOCIATION AMENDS WITHOUT REQUESTING REVIEW, IT MAY BE HELD TO HAVE WAIVED REVIEW IN CASE THE REGIONAL ADMINISTRATOR CONSIDERS THE AMENDMENTS INADEQUATE. IF THE ASSOCIATION DOES BOTH, IT MAY BE FACED WITH AN AFFIRMANCE OF THE DENIALS DESPITE THE FACT THAT

ADEQUATE AMENDMENTS HAVE BEEN MADE.

20 CFR 655.204(c) PROVIDES THAT UPON RECEIPT OF A TEMPORARY LABOR CERTIFICATION APPLICATION THE REGIONAL ADMINISTRATOR SHALL PROMPTLY REVIEW IT FOR TIMELINESS AND ADEQUACY; THAT IF HE DETERMINES THAT THE APPLICATION IS NOT TIMELY HE "MAY PROMPTLY" DENY IT: AND THAT IF HE DETERMINES THE APPLICATION TO BE DEFICIENT WITH RESPECT TO THE REQUIREMENTS OF SECTIONS 655.202-655.203, HE "SHALL" DENY THE APPLICATION. ALTHOUGH THE REGULATION DOES NOT EXPLICITLY PROVIDE FOR AN OPPORTUNITY TO AMEND, THE REGIONAL ADMINISTRATOR IS RIGHT IN THE APPARENT BELIEF THAT SUCH OPPORTUNITY SHOULD BE PROVIDED. THE REGIONAL ADMINISTRATOR HAS INHERENT POWER CONSTRUER THE REGULATION IN ORDER TO GIVE EFFECT AN INTERPRETATION WHICH ALLOWS OPPORTUNITY TO REMEDY DEFICIENCIES, WHICH MAY BE DUE TO INADVERTENCE, SUCH AN INTERPRETATION IS SENSIBLE AND SOUND. HOWEVER, THE AFOREMENTIONED OPPORTUNITY SHOULD BE AFFORDED AFTER A PROMPT PRELIMINARY REVIEW OF THE APPLICATION FOR ADEQUACY AND BEFORE THE REGIONAL ADMINISTRATOR MAKES THE DETERMINATION REQUIRED BY 20 CFR 655.204(c).

III. THE UNDERSIGNED AGREES WITH WESTERN RANGE ASSOCIATION THAT THE DENIALS IN THESE CASES WERE NOT MADE AS PROMPTLY AS REQUIRED BY 20 CFR 655.204(c). THE REGULATION IMPOSES STRICT TIME LIMITATIONS ON THE CERTIFICATION PROCESS. THESE LIMITS MUST BE RESPECTED TO THE GREATEST EXTENT PRACTICABLE. THE PERIODS OF 24 and 28 DAYS, RESPECTIVELY, WHICH ELAPSED BETWEEN THE FILING OF THE APPLICATIONS AND THEIR DENIALS SEEMS SOMEWHAT EXCESSIVE IN VIEW OF THE TIGHT TIME RESTRICTIONS UPON ALL INVOLVED IN THIS MATTER, INCLUDING THIS HEARING OFFICER.

IV. FINALLY IT IS THE OPINION OF THE UNDER- SIGNED THAT THE DEFICIENCIES FOUND IN THE APPLICATIONS WERE DUE TO MISUNDERSTANDINGS AND TO THE JOB OFFER FORMS OF THE U.S. DEPARTMENT OF LABOR WHICH DO NOT CALL FOR ALL THE PROVISIONS AND ASSURANCES REQUIRED BY THE REGULATION.

V. SECTION 655.201 (e) AUTHORIZES THE REGIONAL ADMINISTRATOR, FOR GOOD AND SUBSTANTIAL CAUSE, TO WAIVE THE 80-DAY PERIOD SPECIFIED IN THE SECTION, PROVIDED SUFFICIENT LABOR MARKET INFORMATION IS AVAILABLE. IN THESE CASES THE IDAHO DEPARTMENT OF EMPLOYMENT HAS ADVISED THAT THERE ARE NO DOMESTIC HERDERS IN IDAHO OR SURROUNDING STATES, AT LEAST, FOR .THE ARKOOSH AND ZIDAN, INC., APPLICATION FILED FOUR DAYS BEFORE THE COMPANION APPLICATION OF SULPHUR CREEK LIVESTOCK BEING REVIEWED HEREIN. THE SULPHUR CREEK LIVESTOCK RECORD FILE CONTAINED NO SUCH INFORMATION. IN ORDER TO MINIMIZE THE

EFFECTS OF THE DELAY IN DENYING THE APPLICATIONS AND IN ORDER TO RENDER EFFICACIOUS THE OPPORTUNITY TO AMEND WHICH THE REGIONAL ADMINISTRATOR INTENDED TO PROVIDE, THE ADMINISTRATOR'S DETERMINATION OF AUGUST 11, 1978 IS HEREBY MODIFIED AS FOLLOWS:

1. THE DENIAL OF THE TWO APPLICATIONS IS SET ASIDE;
2. WESTERN RANGE ASSOCIATION MAY AMEND THE APPLICATIONS WITHIN 5 WORKING DAYS FROM THE DATE OF THIS DECISION;
3. THEREAFTER, THE REGIONAL ADMINISTRATOR WILL PROMPTLY REVIEW THE APPLICATIONS, AND, IF HE FINDS THEM TO MEET THE REQUIREMENTS OF SECTIONS 655.202 AND 655.203, HE WILL PROCEED TO MAKE THE DETERMINATIONS REQUIRED BY SECTIONS 655.205 AND 655.206 AS SOON AS REASONABLY POSSIBLE, BUT WITHOUT REGARD TO THE PROVISIONS FOR A 60-DAY RECRUITMENT PERIOD.

JOHN M. BODLEY
Hearing Officer