



**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

DATE PREPARED: 6/18/80

RE: FAULKNER LAND & LIVESTOCK, 80-TLC-8

ON JUNE 2, 1980, THE ABOVE NAMED EMPLOYER APPEALED THE DENIAL OF A TEMPORARY LABOR CERTIFICATION BY THE REGIONAL ADMINISTRATOR (RA) DATED MARCH 29, 1980. THE APPEAL FILE WAS RECEIVED ON JUNE 16, 1980. ON APRIL 21, 1980 THE EMPLOYER FILED AN APPLICATION TO RENEW THE TEMPORARY LABOR CERTIFICATION OF THE ALIEN AS A SHEEPHERDER. THE ALIEN'S PREVIOUS LABOR CERTIFICATION EXPIRED ON FEBRUARY 13, 1980.

ON THE APPLICATION, EMPLOYER LISTED THE DATES HE EXPECTED TO EMPLOY THE ALIEN AS FEBRUARY 14, 1980 UNTIL JANUARY 13, 1981. THE RA DENIED CERTIFICATION PURSUANT TO 20 C.F.R. §655.201(e) BECAUSE THE APPLICATION WAS NOT FILED 80 DAYS PRIOR TO THE ESTIMATED DATE OF NEED AS SPECIFIED BY §655.201(c). THE EMPLOYER CONTENDS (a) THAT THE RA FAILED TO PROVIDE IT WITH A CHANCE TO AMEND THE APPLICATION IN VIOLATION OF THE REGULATIONS; (b) THE RA'S NOTICE OF DENIAL WAS UNTIMELY FILED IN VIOLATION OF §655.204(C) AND (c) THE DENIAL IS AN ABUSE OF DISCRETION, DEPRIVING EMPLOYER OF ITS NEED FOR AN ALIEN IN VIOLATION OF §655.204(c).

I FIND EMPLOYER'S FIRST ARGUMENT INCORRECT BECAUSE ALTHOUGH THE APPLICATION IS FOR A RENEWAL, THE PREVIOUS CERTIFICATION HAS LAPSED AND AN INCREASE IN LENGTH OF EMPLOYMENT IS NOT AN "AMENDMENT" PROVIDED FOR IN §655.201(d). IT IS CLEAR THAT THE APPLICATION WAS UNTIMELY FILED. SECTION 655.201 PROVIDES THAT THE RA IN HIS DISCRETION MAY DENY CERTIFICATION WHERE THE APPLICATION IS UNTIMELY FILED OR HE "MAY WAIVE THE TIME PERIOD SPECIFIED IN THIS SECTION... FOR OTHER GOOD AND SUBSTANTIAL CAUSE, PROVIDED THE RA HAS SUFFICIENT LABOR MARKET INFORMATION TO MAKE THE LABOR CERTIFICATION DETERMINATIONS REQUIRED BY 8 CFR 214.2(h) (3) .

UNDER THE CIRCUMSTANCES OF THIS CASE, THE RA HAD GOOD CAUSE: TO WAIVE TIME FOR FILING THE APPLICATION BECAUSE THE EMPLOYER PLACED WITH STATE EMPLOYMENT SERVICE AND ONGOING JOB ORDER FOR SHEEPHERDERS SINCE JANUARY 10, 1978 WHICH HAS FAILED TO PRODUCE

QUALIFIED, AVAILABLE APPLICANTS. IN AN APRIL 21, 1980 LETTER THE JOB SERVICE STATED "THERE ARE NO DOMESTIC HERDERS AVAILABLE IN IDAHO OR SURROUNDING STATES." (AF 6). FINALLY, ONE OF THE MAIN PURPOSES FOR REQUIRING THE APPLICATION TO BE FILED 80 DAYS , PRIOR TO THE ESTIMATED DATE OF NEED IS SO THAT THE JOB SERVICE HAS AN-OPPORTUNITY TO TEST THE U.S. LABOR MARKET. IN THIS CASE, THE LABOR MARKET WAS BEING TESTED ON AN ONGOING BASIS BY THE STATE FOR THE EMPLOYER AND NO U.S. WORKERS WERE FOUND. THE RA THEREFORE HAD GOOD CAUSE TO WAIVE THE TIME PERIOD SPECIFIED IN §655.201. THE EMPLOYER'S THIRD CONTENTION WAS THAT THE RA DID NOT COMPLY WITH §655.204(c) OF THE REGULATIONS BECAUSE HE RECEIVED THE FILE ON APRIL 24, 1980, 35 DAYS LATER. SECTION 655.204(c) SPECIFICALLY PROVIDES THAT AN RA SHALL PROMPTLY REVIEW AN APPLICATION FOR TIMELINESS AND "MAY PROMPTLY DENY" THE APPLICATION WHERE UNTIMELY FILING IS FOUND (20 C.F.R. 655.204(c)). THE TIME PERIOD TAKEN BY THE RA IN ISSUING THE DENIAL DID NOT COMPLY WITH 20 C.F.R. 8656.204(c) AND THE DELAY MAY HAVE CAUSED THE EMPLOYER AND ALIEN HARDSHIPS. BASED ON THE RECORD AND IN ACCORDANCE WITH THE ABOVE DISCUSSION I MUST REVERSE THE RA'S DENIAL OF TEMPORARY LABOR CERTIFICATION AND HEREBY GRANT CERTIFICATION FOR THE ALIEN NAMED IN THE CERTIFICATION. THIS IS THE FINAL DECISION OF THE DEPARTMENT OF LABOR ON THIS MATTER. THIS DECISION IS BEING TRANSMITTED TO DON A. BALCER, THE REGIONAL ADMINISTRATOR, THE ADMINISTRATOR OF THE U.S. EMPLOYMENT SERVICE, THE ASSOCIATE SOLICITOR FOR EMPLOYMENT AND TRAINING AND THE DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE.

G. MARVIN BOBER
ADMINISTRATIVE LAW JUDGE