

While the variance request was still in litigation, the plaintiff submitted an application on May 10, 1982 for temporary labor certification of 14 foreign workers (20 C.F.R. §655.100 et seq.). By letter dated August 19, 1982, the Regional Administrator granted the employer's request for 5 workers and denied the request as to the remaining 9 workers. The certification denial was predicated on the prior denial of the employer's housing variance request. The Plaintiff thereafter filed a request for expedited judicial review, in accordance with 20 C.F.R. §655.212, and an order was issued on September 14, 1982, consolidating the two matters for that purpose. Inasmuch as the applicable regulations dictate that such review shall be limited to the record, it was ordered on October 4, 1982, that an evidentiary hearing would not be held.

The Wagner-Peyser Act of 1933 created the United States Employment Service as a branch of the Department of Labor. The duties of the Employment Service include the maintenance of a "farm placement service," "systems of public employment offices in the several states," and a "system for clearing labor between the several states." 29 U.S.C. §349b(9) The Secretary is authorized to make such rules and regulations as necessary to effectuate the purposes of the Act. 29 U.S.C. §349k

The United States Employment Service, in cooperation with State and local officials, assists employers in recruiting agricultural workers from places outside the area of intended employment. It was the experience of the Employment Service that the housing provided to such workers was often substandard. 20 C.F.R. §654.400(a). To remedy this situation, the Secretary promulgated minimum housing standards and conditioned receipt of Employment Service benefits on compliance with these standards.

Prior to April 3, 1980, it was the practice of the Employment and Training Administration to grant seasonal variances from specific requirements of the housing standards. 45 F.R. 14180 (March 4, 1980) In 1980 the Department of Labor amended the regulations to eliminate the practice of seasonal variances. Id. The amendments adopted a one-time request for permanent structural variances and, at the same time, established a framework for a gradual transition from Employment and Training Administration (ETA) standards to Occupational Safety and Health Administration

(OSHA) standards. 2/ All applications for permanent structural variances were to be submitted to ETA no later than June 2, 1980. 20 C.F.R. §654.402

To qualify for a permanent structural variance, the employer must:

(1) Show that the variance is necessary to obtain a beneficial use of an existing facility and to prevent a practical difficulty or unnecessary hardship; and

(2) set forth the specific alternative measures which the employer has taken to protect the health and safety of workers and adequately show that such alternative measures have achieved the same result as the standards from which the employer seeks a variance. (§654.402(a))

The plaintiff in this matter has requested variances from floor space and window area regulations affecting three buildings on his business premises. 3/ In his request for

2/ Between 1971 and 1980 the Department of Labor applied two sets of standards to housing occupied by agricultural workers. Such housing was required to conform to both Employment and Training Administration (ETA) standards and Occupational Safety and Health Administration (OSHA) standards. The overlap in these regulations created substantial enforcement problems leading, ultimately, to a transitional provision which substituted the OSHA standards for the ETA standards. See 45 F.R. 14180 (March 4, 1980).

3/ In a building designated the "White Trailer," the plaintiff proposes to use a room of 93 sq. ft., to be occupied by two persons, which is short 7 sq. ft. of floor area; in the same building, the plaintiff proposes to use another room of 97 sq. ft., to be occupied by two persons, which is short 3 sq. ft. of floor area. In a building designated "Building #1," the plaintiff proposes to use a room of 420 sq. ft. which is short 13 sq. ft. of window area. Finally, in a building designated "Building #2," the plaintiff proposes to use a room of 138 sq. ft., to be occupied by two persons, which is short 5 sq. ft. of window area, and a second room of 123 sq. ft., to be occupied by two persons, which is short 4 sq. ft. of window area.

The variances requested for the "White Trailer" involve a 7 percent and 3 percent reduction in floor area for each of the respective rooms. As to "Building #1," the plaintiff is requesting roughly a 30 percent reduction in window area, and in "Building #2," the plaintiff requests a 35 percent and 30 percent reduction in window area for the two rooms.

variances dated May 13, 1980, the Plaintiff states that the rooms are well lit and ventilated and that the replacement or alteration of the units in question would be very costly. The record is devoid of any facts to support this conclusion. The same conclusions, unsupported by facts, are reiterated in the plaintiff's letter to this office dated August 23, 1982. The plaintiff alleges that the rooms are well lit but fails to specify the source of the light, its output or intensity, or any other facts which would tend to show that the same result has been achieved as that mandated by the regulation. Similarly, the record contains no facts which would support the plaintiff's allegation that the rooms are well ventilated, or that the same result has been achieved by the plaintiff's method as would have been achieved by compliance with the regulation. 4/

The regulation not only requires the plaintiff to show that the same result has been achieved by alternate means but also that the variance is necessary "to prevent a practical difficulty or unnecessary hardship." Neither of the plaintiff's submissions recite facts to substantiate the claim that compliance with the regulation would be unduly burdensome or impracticable.

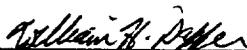
The plaintiff has the burden of proving the essential elements of his case. "It is well settled that the burden of proof rests upon one who files a claim with an administrative agency to establish that the required conditions of eligibility have been met." Brock v. Weinberger, 405 F.Supp. 1329 (W.D. Ark. 1975) (citations omitted); See also, England v. Weinberger, 387 F.Supp. 343 (S.D. W. Va. 1974). An applicant for a waiver from a regulation "has the burden of convincing the agency that it should depart from the general rules and of demonstrating to the reviewing court that the agency's reasons for refusing to do so were so insubstantial as to amount to an abuse of discretion." Ashland Exploration v. Federal Energy Regulatory Commission, 631 F.2d 817 (D.C. Cir. 1980)

As detailed above, the plaintiff has not sustained his burden of proof and accordingly cannot prevail notwithstanding the fact that the defendant's denial was in conclusory form and the defendant did not make a separate evidentiary

4/ It is reasonable to assume that a 30 or 35 percent reduction in window area will result in a measurable reduction in ventilation and light. Inasmuch as the plaintiff has adduced no facts to the contrary, I cannot accept its unsupported assertions that the rooms are well lit and ventilated. It is not reasonable to infer that the rooms are as well lit and ventilated as they would be if the plaintiff complied with the applicable regulations.

presentation. 5/ Under these circumstances, the only appropriate disposition of this matter is to affirm the decision of the Regional Administrator. Moreover, since ETA's denial of the temporary labor certification was predicated entirely on the denial of the variances, it follows that the Regional Administrator's decision as to the certification should likewise be affirmed. 6/

Accordingly, the Regional Administrator's decisions are both affirmed and this appeal is hereby DISMISSED.



WILLIAM H. DAPPER
Administrative Law Judge

OCT 20 1982
Dated: _____
Washington, D.C.

WHD/paw

5/ The defendant, by letter to Deputy Chief Administrative Law Judge Thomas dated October 8, 1982, discussed certain aspects of the instant proceeding. The letter, however, was not served on the plaintiff and therefore has not been considered in the decision herein.

6/ Grant of the temporary labor certification is dependent on prior grant of a permanent housing variance. Since the permanent housing variance is denied herein, it follows that the temporary labor certification must also be denied.

SERVICE SHEET

CASE NAME: Yonder Fruit Farms, Inc.

CASE NO.: 82-WPA-20

TITLE OF DOCUMENT: DECISION AND ORDER

A copy of the above document was sent to the following parties

on OCT 20 1982.

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