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Issue Date: 06 December 2011

OALJ Case No.: 2012-TLC-00006

ETA Case No.: C-10335-25647

In the Matter of

HEARN FARMS, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING PARTIAL CERTIFICATION

On November 22, 2011, Hearn Farms, Inc. (“the Employer”) filed a request for review of the Certifying Officer’s determination in the above-captioned temporary agricultural labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.171. On November 29, 2011, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”). In administrative review cases, the administrative law judge has five business days after receiving the file to issue a decision on the basis of the written record. 20 C.F.R. § 655.171(a).

STATEMENT OF THE CASE

On October 24, 2011, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor

certification for two “farm workers – livestock.” AF 77-85.¹ The Employer listed the job duties for the position as follows, in relevant part:

Performs any of the following tasks to attend to livestock, such as cattle on farm. Maintain heated watering systems and operating snow removal equipment in order to operate feed wagons. Mixes feed and additives, fills feed troughs with feed and water for livestock and remove ice formed in water. Examines animals to detect diseases and injuries. Vaccinates animals by placing vaccine in drinking water or feed using syringes and hypodermic needles. Applies medications to cuts and bruises, spray livestock with insecticide. Confines livestock in stalls, washes and clips them to prepare them for calving and assists veterinarian in delivery of offspring. Binds or clamps testes or surgically removes testes to castrate livestock. Clips identifying notches or symbols on animal, or brand animal, using branding iron, to indicate ownership. Cleans livestock stalls and sheds, using disinfectant solutions, brushes and shovels. Maintain buildings and equipment. Maintain breeding, feeding and costs records. Minimum three months experience.

AF 79. On November 4, 2011, the Employer’s application was accepted for processing, and the CO required the Employer to submit a recruitment report by November 17, 2011. AF 53-57. The CO reminded the Employer that it must interview all U.S. workers who apply or on whose behalf an application is made. AF 56.

The Employer responded to the Notice of Acceptance (“NOA”) on November 16, 2011, stating that it received three referrals from the Kansas State Workforce Agency (“SWA”).² The Employer stated that Dannon Busby was uninterested in the job because he lived 4 ½ hours from the worksite and that Delmar Beachy did not return the Employer’s call. AF 38-39. The Employer also stated that it was still waiting on a response from JD Webb, who the Employer called on November 10, 2011. AF 37. The Employer stated “the applicant is 63 yrs old – don’t know if he can drive a truck.” *Id.* The recruitment report was signed and dated on November 11, 2011. AF 37-39.

On November 16, 2011, a representative from the Kansas SWA notified the Chicago National Processing Center (“CNPC”) that the Employer received two referrals from the SWA – Mr. Busby and Mr. Webb. AF 29. The SWA representative stated that she was unable to reach Mr. Busby because his voicemail box was full, but that she did speak with Mr. Webb on November 16, 2011, and he is interested in the job opportunity at Hearn Farms. AF 29-30.

¹ Citations to the 102-page Administrative File will be abbreviated “AF” followed by the page number.

² The Employer’s recruitment report was faxed to the Employer’s agent on November 11, 2011. AF 37-39.

Additionally, the SWA representative notified the CNPC analyst that Mr. Webb said that he called the Employer on November 14 and November 15, but they have not returned his calls. AF 29-30.

On November 17, 2011, the CO partially certified the Employer's application. AF 23-27. The CO notified the Employer that it had reduced the number of certified workers by one because the SWA referred Mr. Webb, who is an able, willing, available, and qualified worker. AF 27. The CO found that the Employer's job description makes no reference to any driving duties, and therefore, it was not lawful to reject Mr. Webb based on its assumption that he could not drive a truck. *Id.*

On November 22, 2011, the Employer requested administrative review of the partial certification, arguing that the Employer spoke to Mr. Webb on November 19, 2011, and that he indicated that he has found other employment. AF 1-22. The CO filed a brief on December 5, 2011, asserting that the Kansas SWA had referred Mr. Webb, who was able, willing, and qualified, but the Employer had unlawfully rejected Mr. Webb. Accordingly, the CO argued that the Employer's certified application had properly been reduced by one under 20 C.F.R. § 655.165.

DISCUSSION

In order to apprise U.S. workers of the agricultural position that is the subject of the H-2A application, the regulations require an employer to place a job order with the SWA serving the area of intended employment prior to filing an application for temporary labor certification. 20 C.F.R. § 655.121(a). The SWA refers individuals to the employer who have been apprised of all the material terms and conditions of employment and have indicated, by accepting referral to the job opportunity, that he or she is qualified, able, willing, and available for employment. 20 C.F.R. § 655.155. An employer bears the burden of demonstrating that there are not sufficient U.S. workers who are able, willing, and qualified to perform the work in the area of intended employment. 20 C.F.R. § 655.103(a).

The regulations provide that in making a determination as to whether there are insufficient U.S. workers to fill the employer's job opportunity, the CO will count as available any U.S. worker referred by the SWA or any U.S. worker who applied (or on whose behalf an application is made) directly to the employer, but who was rejected by the employer for other

than a lawful job-related reason or who has not been provided with a lawful job-related reason for rejection by the employer. 20 C.F.R. § 655.161(b).

Section 655.165 provides, in relevant part:

The CO may issue a partial certification, reducing either the period of need or the number of H-2A workers being requested or both for certification, based upon information the CO receives during the course of processing the *Application for Temporary Employment Certification*, an audit, or otherwise. The number of workers certified will be reduced by one for each referred U.S. worker who is able, willing, and qualified, and who will be available at the time and place needed and has not been rejected for lawful job-related reasons, to perform the services or labor.

The Employer's recruitment report stated that it was still waiting for a response from Mr. Webb to set up an interview. The Employer's recruitment report also stated that Mr. Webb is 63 years old and the Employer was unsure if he can drive a truck. On appeal, the Employer argues that on November 19, 2011, the Employer spoke to Mr. Webb and Mr. Webb indicated that he had found other employment.

The evidence in the record indicates that Mr. Webb followed up with the Employer about the opportunity on November 14 and November 15, 2011, but was unable to get into contact with the Employer. The Employer made no mention of this in its recruitment report, which, although was sent to the Employer's agent on November 11, 2011, was not submitted to the CO until November 16, 2011. The Employer provides no explanation as to why it did not follow-up with Mr. Webb prior to filing its recruitment report with the CO. Although the Employer now argues that Mr. Webb has found other employment and is no longer available, this argument is new evidence that cannot be considered by an ALJ when an employer requests expedited administrative review on the basis of the written record. 20 C.F.R. § 655.171(a). Accordingly, I may not consider any argument or evidence demonstrating that Mr. Webb is no longer interested in the job opportunity.

Although I disagree with the CO's determination that the Employer rejected Mr. Webb because it was unclear whether he could drive a truck, I find that the Employer failed to adequately follow-up with Mr. Webb by not returning his phone calls on November 14 and November 15. As such, the Employer has not met its burden of demonstrating that Mr. Webb is not able, willing, or qualified to perform the work, and CO properly reduced the number of H-2A workers certified by one under 20 C.F.R. § 655.165.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

A

WILLIAM S. COLWELL

Associate Chief Administrative Law Judge