

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 14 August 2012**

**OALJ Case No.: 2012-TLC-00080**

**ETA Case No.: C-12179-35137**

*In the Matter of*

**JOHN CHEFAS d/b/a HART TREE FARM,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago Processing Center

Appearances: Wendell Hall, Esq.  
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Washington, D.C.  
*For the Employer*

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*For the Certifying Officer*

Before: Richard K. Malamphy  
Administrative Law Judge

**DECISION AND ORDER**  
**VACATING BASIS FOR NOTICE OF DEFICIENCY**

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the implementing regulations at 20 C.F.R. Part 655, Subpart B. On July 20, 2012, John Chefas d/b/a Hart Tree

Farm (“the Employer”) filed a request for review of the Certifying Officer’s denial of its H-2A application for temporary alien labor certification in the above-captioned temporary agricultural labor certification matter. *See* 20 C.F.R. § 655.112. On July 30, 2012, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”). When a party requests a de novo hearing, the administrative law judge has five calendar days to schedule a hearing after receipt of the appeal file, upon request of the Employer, and ten calendar days after the hearing to render a decision. 20 C.F.R. § 655.115(a). The undersigned held a conference call with the parties on August 2, 2012 in which the parties agreed to submit briefs without holding a hearing.

### **STATEMENT OF THE CASE**

On June 12, 2012, the Employer submitted a job order, ETA Form 790, to the North Carolina state workforce agency (“SWA”) in connection with its application for temporary labor certification for nine farm workers from August 13, 2012 to December 28, 2012. (AF 121-131). On June 15, 2012, the SWA issued a Notice of Deficiency (“NOD”), finding one deficiency. (AF 165-167). The SWA found that the Employer had listed as a condition of employment a requirement that was not normal and common among non-H-2A employers in the same occupations and crops in the area of intended employment. Specifically, the Employer listed as a condition of employment that “applicants must be able to furnish affirmative job references establishing acceptable previous experience.” (AF 167).<sup>1</sup> The Employer responded to the NOD on June 26, 2012, arguing that the requirement did not violate the regulations. (AF 159-160).

On June 26, 2012, the Employer filed an emergency application with the United States Department of Labor’s Employment and Training Administration (“ETA”) On July 3, 2012 the Certifying Officer (“CO”) issued a NOD listing four deficiencies. (AF 91-95). Two were related to the Employer’s affirmative reference requirement. First, the CO noted that 20 C.F.R. § 655.122(b) requires “[e]ach job qualification and requirement listed in the 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.” The CO argued that the Employer’s affirmative reference requirement is restrictive and excessive. Therefore, the CO stated that the Employer must amend the requirement to state only that applicants must be able to

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<sup>1</sup> Citations to the Administrative File will be abbreviated “AF” followed by the page number. The CO’s brief will be referred to as “CO Brief” and the Employer’s Brief as “Emp. Brief,” both followed by the page number.

furnish job references. (AF 93-94). Secondly, the CO cited to 20 C.F.R. § 655.122(a), requiring that “[t]he employer’s job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers.” The CO stated that the North Carolina state workforce agency had expressed concerns that the Employer would not be able to apply the affirmative reference requirement consistently to both U.S. and foreign H-2A workers. (AF 94).

The Employer responded on July 10, 2012, refusing to change the reference requirement. (AF 32-36). The Employer argued, “To require that applicants possess one month prior experience in the job described but provide no means by which to confirm that experience renders the requirement itself all but meaningless.” (AF 34).

On July 17, 2012 the CO issued a second NOD with only one deficiency. (AF 19-23). The NOD stated:

The employer’s requirement that domestic applicants provide an affirmative i.e., positive, reference is unacceptable because it violates the employer’s assurance contained in section 655.135(a) that domestic worker applicants will be rejected only for lawful job related reasons. Precedent from the BALCA interpreting identical language in the permanent labor certification program has established that a neutral reference from a prior employer does not constitute a lawful job related reason for rejecting an otherwise qualified domestic worker. *Norman Industries*, 88-INA-202 (1988). With respect to the reference requirement, the following language will be acceptable. **“Applicants must be able to furnish verifiable job references.”**

(emphasis in original) (AF 22).

The Employer responded on July 24, 2012, requesting de novo review. (AF 1-18). The Employer argued the July 17 NOD is invalid because once it has been seven days after the DOL has received the Employer’s application, the CO can only demand changes to the “minimum wages, benefits, and working conditions” section of the job offer. (AF 1). Further, the Employer argued that in *Norman Industries* BALCA did not find that requiring a positive reference requirement was unreasonable or unlawful, only that the employer had not documented that it

had either received a poor reference or made a reasonable attempt to obtain a reference in the circumstances of that case. (AF 2-4).

### **POSITION OF THE PARTIES**

#### *Timeliness of the July 17 NOD*

The regulation at 20 C.F.R. 655.141(a) gives the CO the authority to issue a NOD within seven days of the receipt of the employer's application if the applicant or job order "are incomplete, contain errors or inaccuracies, or do not meet" the regulatory requirements. Since the July 17 NOD was issued 20 days after the Employer's application was filed, the Employer argues the CO did not have the authority to issue it. The CO explained the second NOD was issued to address an issue raised by the Employer's response to the first NOD in the interest of avoiding an appeal or the filing of a new application. Emp. Brief at 3-4. Regardless of whether it was within the CO's authority to issue, the CO argues that BALCA has the authority to consider the underlying issue raised in the second NOD because the regulations do not provide for any substantive rights or remedies to an employer when a NOD is not timely issued. CO Brief at 4.

The Employer argues that after seven days, the CO may only demand changes to the "minimum benefits, wages, and working conditions" in the job order under 20 C.F.R. § 655.121(e) at any time prior to the issuance of the final determination and the deficiency in this case does not related to any of the three as defined by Section 655.122. Emp. Brief at 20-23.

#### *Basis for the NOD*

The CO argues that an employer cannot lawfully require that a potential U.S. applicant supply a positive reference rather than a neutral reference and the Employer's requirement of an "affirmative reference" is equivalent to a positive reference. The CO concluded:

The affirmative reference language in both [the Employer's] job order and application allows [the Employer] to reject an otherwise qualified U.S. worker for their inability to provide an affirmative (positive) reference, even if the potential worker receives a neutral (i.e, a reference stating only that the applicant worked there) reference from a previous employer. Allowing [the Employer] to reject qualified U.S. workers because an applicant's former employer, for reasons beyond the control of the applicant, refuses

to discuss the applicant's performance would unfairly punish the applicant. Based on the Board's holdings in both *Livingston Health Care* and *Tahoe Sierra Services* an employer cannot reject an otherwise qualified U.S. worker because their prior employer gives them a neutral rather than a positive reference. Accordingly, the job order and application contain an unlawful condition of employment, thus denial of [the Employer's] application is appropriate.

CO Brief at 3 (footnotes omitted). The CO conceded that rejection of a U.S. worker who receives a poor reference is lawful, and explained that the concern is solely the rejection of a worker who receives a neutral reference. CO Brief at 2.

The Employer first argues that the CO's denial is prematurely based on an allegedly unlawful rejection that may never come to pass. The Employer notes that at the time of the NOD it was unknown if the Employer would get any domestic applicants at all, let alone reject any for a reason related to providing a reference. Emp. Brief at 12-13. "If the CO's theory were sound, every Application would be deficient because it is always possible to imagine a possible violation of some kind. For example, the CO states that he would accept a requirement for "verifiable references." It is possible to imagine, however, that an employer might understand "verifiable" to mean references that verify qualifications. But, according to the CO, that would be unlawful under *Norman Industries, infra.*" Emp. Brief at 12. The Employer argues it cannot demonstrate future compliance. Emp. Brief at 12.

With respect to the reference requirement, the Employer contends that it is established in common law that an employer need not hire a person when the employer cannot determine if the person is qualified. Emp. Brief at 13. The Employer argues that it is state contract law that should apply to the Employer's job order containing the affirmative reference requirement. Instead, the CO incorrectly relies on *Norman Industries*, a case decided under the permanent labor certification regulations, not the H-2A regulations. Emp. Brief at 14-15. Further, the Employer argues that *Norman Industries* actually held that a positive reference is lawful if an employer notifies the prospective applicant of the requirement. Emp. Brief at 15. The Employer stated:

*Norman Industries* was denied certification not because it required a positive reference, but because the way it implemented the requirement suggested bad faith...

Indeed, here, the situation is reversed. The Employers are telling potential applicants that a positive reference is required so that they can get such a reference; the CO is demanding that Employers withhold this information (arguably making a request for a positive reference unlawful under *Norman*.)

Emp. Brief at 16. The Employer concluded:

The common law allows an employer to decline to hire an applicant for failing to provide appropriate references. *Norman Industries* and progeny, to the extent that they are applicable at all, do the same. If an Employer were to reject an applicant who failed to demonstrate that he or she was qualified, that would be a lawful, job-related reason under the H-2A program regulations.

Emp. Brief at 18.

## DISCUSSION

### *Timeliness of the July 17 NOD*

The Employer filed its application on June 26, 2012. The CO issued a second NOD on July 17, 2012 citing to 20 C.F.R 655.141 as the regulatory basis. Section 655.141(a) provides that if a CO determines an employer's application or job order are "incomplete, contain errors or inaccuracies, or do not meet the requirements set forth in this subpart, the CO will notify the employer within 7 calendar days of the CO's receipt of the [application]." The notice must state the reasons for the notice; offer the employer an opportunity to submit a modified application; and state that the CO's determination will be made no later than 30 calendar days before the date of need, provided that the employer submits the requested modification in a manner specified by the CO. The CO issued the second NOD later than seven days from the date the application was filed. Consequently, I find that the CO's July 17, 2012 NOD is not timely.

However, "neither the regulations nor the regulatory history indicate that the CO's failure to comply with a timeliness requirement triggers any type of procedural or substantive rights or remedies for aggrieved employers." *Agricultural Advancements, LLC*, 2012-TLC-65, slip of. At 5 (May 8, 2012). *See also, Frey Produce & Frey Bros. #2 and Frey Produce & Frey Bros. #3*,

2011-TLC-403 and 404, slip op. at 5-6 (June 3, 2011). Thus, even though the CO's identification of the issue on appeal was not timely raised, the Employer is not entitled to any type of equitable relief from the CO's noncompliance with Section 655.141(a).

*Basis of the Deficiency*

The language at issue in this case appears in the Employer's job offer and job order. The job order states: "Applicants must be able to furnish affirmative job references from recent employers operating comparable operations establishing acceptable previous experience." ETA Form 790, Attachment 1, page 3 (AF 138). The job offer states: "Applicants must be able to furnish affirmative job references establishing acceptable previous experience." ETA Form 9142, Attachment 1, page 1. (AF 130)

An employer seeking to employ H-2A workers must agree as part of its application for temporary employment certification and job offer that it will make certain assurances, including that:

The job opportunity is, and through the period set forth in paragraph (d) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship. Rejections of any U.S. workers who applied or apply for the job must be only for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer has and will continue to retain records of all hires and rejections as required by §655.167.

20 C.F.R. § 656.135(a). The CO argues that the affirmative reference language in the Employer's job offer would allow it to unlawfully reject an otherwise qualified U.S. worker who received a neutral reference from a previous employer.

Under the temporary labor certification regulations, after rejecting a U.S. worker who applied but was not hired, an employer must explain the lawful, job-related reasons for not hiring that worker in a recruitment report submitted to the CO. 20 C.F.R. § 656.156(a)(4). The CO may only certify an employer's application to admit nonimmigrant workers on H-2A visas for temporary agricultural employment in the U.S. if the employer is able to demonstrate there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of

intended employment at the time needed. 20 C.F.R. § 655.103(a). 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. § 656.161(b).

Employers may reject potential hires for lawful, employment-related reasons. The regulations put limits on the qualifications and requirements that may be listed in a job offer. They must be “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). Further, “job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2A workers.” 20 C.F.R. § 655.122(a). However, the CO does not contend the affirmative reference requirement listed by the Employer is not bona fide, normal and accepted, or imposed upon U.S. workers but not H-2A workers. Instead, the CO suggests the requirement is setting the Employer up to be able to reject U.S. workers for what it alleges is an unlawful reason.

As the Employer notes, no worker in this case has at this point been rejected for any reason. The Employer agreed when it submitted its application that it would only reject U.S. workers for lawful, job-related reasons as required by the regulations. 20 C.F.R. § 656.135(a), 20 C.F.R. § 656.156(a)(4). At the time the CO issued the NOD, the Employer had not failed to comply with that assurance. The CO’s argument is merely that the Employer has the potential to do so by including a requirement that applicants furnish “affirmative job references from recent employers... establishing acceptable previous experience” because the Employer may apply that requirement to require positive, not merely neutral, references. The Employer suggests that even if positive references were required, rejection for not having such a reference would still be lawful.

The arguments of the parties, however, involve a situation that is merely hypothetical at this point. There has been no rejection of any U.S. worker based on any reference involving any circumstances that can be evaluated to determine compliance with 20 C.F.R. § 656.135(a) and 20



C.F.R. § 656.156(a)(4). I decline to speculate as to how the Employer will apply its “affirmative reference” requirement and what hypothetical application involving unknown positive, neutral, or negative references would constitute a lawful versus unlawful rejection of a U.S. worker. If, after the Employer has considered any and all U.S. applicants and submitted its recruitment report describing the reasons for rejecting any workers who were rejected, the CO believes there has been an actual violation, the CO may then take action against the Employer. To resolve such a dispute now is premature.

I find the Employer has not violated its assurance under 20 C.F.R. § 656.135(a) that U.S. applicants will only be rejected for lawful job-related reasons.

**ORDER**

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s Notice of Deficiency is **VACATED** and this case is **REMANDED** for further processing consistent with this decision.

**A**

RICHARD K. MALAMPHY  
Administrative Law Judge

RKM/AMC/jcb  
Newport News, Virginia