

**U.S. Department of Labor**

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**Issue Date: 09 November 2011**

**OALJ Case No.: 2012-TLC-00005**

**ETA Case No.: C-11263-30085**

*In the Matter of*

**JOHN GOSNEY,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago Processing Center

Before: **STEPHEN L. PURCELL**  
Chief Administrative Law Judge

**DECISION AND ORDER VACATING AND  
REMANDING CO'S DENIAL OF CERTIFICATION**

On October 25, 2011, John Gosney (“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(a). On October 31, 2011, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”).

### Statement of the Case

On September 20, 2011, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from the Employer for temporary labor certification for three "Farmworkers, Livestock." AF 76-90.<sup>1</sup> For its minimum job requirements, the Employer indicated that it required three months of experience in the occupation and an employment reference. AF 79.

On September 21, 2011, the CO issued a Notice of Deficiency ("NOD") finding two deficiencies.<sup>2</sup> AF 57-60. Both of the deficiencies related to a Notice of Deficiency issued by the Oklahoma State Workforce Agency ("SWA") on September 8, 2011. AF 66-70. In the NOD, the CO cited to 20 C.F.R. § 655.122(a), which states 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 said that it is not normal and common practice in Oklahoma to require experience and references and pointed to an ad hoc survey conducted by the Oklahoma SWA with non-H-2A livestock farms on September 8, 2011. This survey found that 8 of the 10 farms contacted do not require experience and 10 out of 10 do not require references. The CO required that the Employer remove the three month experience and reference requirements or provide documentation substantiating the appropriateness of each of these job qualifications.

On October 3, 2011, the Employer responded that he has over 300 head of livestock on his farm at any given time, which equates to an investment in excess of \$300,000. Regarding the experience requirement, he said, "[t]he health of our livestock is dependent on the caretaker who can recognize illness before the animal is critically ill; recognitions comes with experience." AF 56. On the reference requirement, he stated that his business depends on persons with respectable work ethics and like any other business, he needs individuals who are trustworthy, timely and conscientious. He explained that, "an individual's employment history was the most valuable in evaluating job applicants." *Id.* The Employer included a letter from Michele Eischen, a loan Officer at Community National Bank. This letter asserts that when seeking employees to work for any business, a need for experience and references is a necessity. She stated, "I cannot imagine hiring anyone to work with equipment and cattle worth thousands of

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<sup>1</sup> Citations to the Administrative File will be abbreviated "AF" followed by the page number.

<sup>2</sup> The NOD also referenced a third deficiency involving temporary need, which was subsequently resolved.

dollars and not requiring experience and references.” Ms. Eischen further argued that those surveyed by the Oklahoma SWA likely do not operate agricultural business in the same manner or on the same scale as Mr. Gosney.

On October 6, 2011, the CO issued a second Notice of Deficiency. AF 42-46. This NOD cited 20 C.F.R. § 655.122(b), which provides, “[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 stated that he received an e-mail from Mr. Gosney and a letter from Michele Eischen of Community National Bank in support of the Employer’s experience and reference requirements, but indicated that the Employer must provide documentation from credible sources and references, such as an AG Extension Service, local Farm Bureau, or educators in the agricultural field. He further asserted that the Oklahoma SWA survey showed that the majority of non-H-2A livestock farms surveyed did not require experience or references.

On October 17, 2011, the Employer responded that since its explanation was not deemed “credible” by the National Processing Center (“NPC”), it was enclosing a letter from Jim Rhodes, Extension Educator, Ag/4-H, Major County from the Oklahoma Cooperative Extension Service office. AF 33-34. This letter states that it is common practice for agricultural producers to ask for references as they make employment decisions. AF 38. Mr. Rhodes said that the purpose of asking for references was to find out whether the potential employee was dependable and to verify any experience indicated. Mr. Rhodes also stated that it is common to require experience since it is relevant to handling livestock, the health of livestock, and the safety of the worker.

On October 21, 2011, the CO denied certification, again citing the Employer’s failure to comply with 20 C.F.R. § 655.122(b). AF 23-26. The denial indicated that the letters of explanation the Employer submitted on October 5, 2011, which explained the experience and reference requirements, failed to substantiate how the requirements are consistent with the normal and accepted qualifications required by non-H-2A employers. The CO stated that the Chicago NPC requires documentation relevant to the agricultural industry, such as from the AG Extension Service, local Farm Bureau, or educators in the agricultural field, in order to establish the appropriateness of requirements listed in the job offers. Regarding the Employer’s second submission of letters explaining its experience and reference requirement, the CO stated that the

Employer's letter from the Oklahoma Cooperative Extension Service fails to distinguish between H-2A and non-H-2A employers. The CO asserted that the Employer was given three opportunities to either remove the experience and reference requirements or substantiate how they are 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, but that the Employer failed to do either.

On October 24, 2011, the Employer appealed the denial, asserting that it has provided a very detailed explanation with its application, but that the NPC did not consider its explanation believable or satisfactory. The Employer explains that Michele Eischen, the author of its first letter, has over 18 years of experience assisting farmers and ranchers in Major County, Oklahoma, where agriculture is the principal industry, thus she is very well qualified to address to job requirement concerns of the NPC. The Employer states that when it received the second NOD, stating that the NPC required documentation from credible sources and references, such as an AG Extension Service, local Farm Bureau, or educators in the agricultural field, it submitted additional documentation from Jim Rhodes, Extension Educator, Ag/4-H, Major County from the Oklahoma Cooperative Extension Service office. It asserts that Mr. Rhodes confirmed the arguments already presented and re-emphasized that it is common practice for agricultural producers to ask for references as they make employment decisions and want agricultural workers to have minimal work experience. The Employer argues that the NPC rejected its documentation, then changed the requirements from what was requested in both NOD letters. It asserts that the NOD letters required it to provide documentation substantiating the appropriateness of the job qualifications for this specific application, which is exactly what it did three times. The Employer argues that the NOD letter did not require it to "substantiate how the requirements are consistent with the normal and accepted qualifications required by non-H-2A employers," although this is the basis for its denial.

Regarding the survey the Oklahoma SWA conducted, the Employer asserts that the NPC is assuming the right to regulate its business practices based on the results of a survey conducted of 10 businesses. It argues that the survey fails to state the success of the businesses surveyed, the size of their operations, the amount of money invested, the rate of injury to non-experienced workers, the turn-over of workers, and the liability of the owners of these businesses. The Employer asserts that it has more than \$500,000 invested in livestock production and that it has

the right to protect its investment and manage the safety of its employees and livestock by requiring minimal criteria for employment.

The Solicitor's appeal brief notes that the regulations at 20 C.F.R. 655.122(b) provide that "[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." Counsel for the Solicitor states that the Employer has the burden of establishing eligibility for the H-2A program citing *Westward Orchards*, 2011-TLC-411 (July 8, 2011) and *Salt Wells Cattle Company, LLC*, 2011-TLC-185 (Feb. 8, 2011). The Solicitor's attorney further argues the Employer has not established that either the experience or reference requirement was a "normal and accepted" practice for non-H-2A livestock farmers in Oklahoma. He also asserts that the Employer had clear and consistent notice of the identified deficiencies throughout the process, but did not remedy them.

### **Discussion**

The H-2A regulations provide, in relevant part, that in order to bring nonimmigrant workers to the U.S. to perform agricultural work, an employer must demonstrate that 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 and that the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.103(a). The Immigration and Nationality Act ("INA") provides that "[i]n considering whether a specific qualification is appropriate in a job offer, the Secretary shall apply the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops." 8 U.S.C. § 1188(c)(3)(A). The implementing regulation at 20 C.F.R. § 655.122(b) provides:

Each 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. Either the CO or the SWA may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job offer.

In the Notice of Deficiency, the CO indicated that it is not normal and common practice in Oklahoma to require experience and references for the position of "Farmworker, Livestock,"

and cited to the above-quoted regulation at 20 C.F.R. § 655.122(b).<sup>3</sup> The CO also referred to an ad hoc survey conducted by the Oklahoma SWA on September 8, 2011, with non-H-2A livestock farms. This survey found that 8 of the 10 non-H-2A farms contacted do not require experience and 10 out of 10 of the non-H-2A farms do not require references. The CO required that the Employer remove the three month experience and reference requirements or provide documentation substantiating the appropriateness of each of these job qualifications.

In its attempt to provide documentation substantiating the appropriateness of each of its job qualifications, the Employer submitted letters from John Gosney, the Employer; Michele Eischen, a loan officer at the local Community National Bank; and Jim Rhodes, Extension Educator, Ag/4-H, Major County from the Oklahoma Cooperative Extension Service office. Upon receiving the first two letters, the CO issued an NOD indicating that the letters were not from credible sources and references relevant to the agricultural field. The CO stated that the NPC required documentation from credible sources and references, such as an AG Extension Service, local Farm Bureau, or educators in the agricultural field. Thus, the Employer submitted a third letter from Jim Rhodes, Extension Educator, Ag/4-H, Major County from the Oklahoma Cooperative Extension Service office, asserting that it is common practice for agricultural producers to require minimal experience and ask for references. In response to this additional evidence, the CO issued a denial of certification, finding that the third letter failed to distinguish between H-2A and non-H-2A employers.

A Notice of Deficiency must state the reasons why the application or job order fails to meet the criteria for acceptance, and offer the employer an opportunity to submit a modified application. 20 C.F.R. § 655.141. In *Miaofu Cao*, 1994-INA-53 (Mar. 14, 1996) (en banc), a cases arising under the regulations governing permanent alien labor certification, the Board found that a Notice of Findings<sup>4</sup> must put the employer on notice of the reason for proposal to deny certification, but it is not required to be a detailed guide on how to achieve labor certification. The Board emphasized that the burden is placed on the employer by the statute and regulations to produce enough evidence to support its application.

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<sup>3</sup> In the first NOD, issued on September 21, 2011, the CO cited to 20 C.F.R. § 655.122(a), rather than 20 C.F.R. § 655.122(b). However, the CO corrected this mistake in his second NOD. Additionally, the NOD issued by the Oklahoma SWA on September 8, 2011, in response to the job order, cited to both 20 C.F.R. § 655.122(a) and (b).

<sup>4</sup> *Miaofu Cao* was decided under the “pre-PERM” regulations, which included a “Notice of Findings” procedure that permitted an employer to rebut the CO’s proposed grounds for denial of certification. This was similar to the “Request for Information” procedure of the H-2A regulations.

In *Miaofu Cao*, the Board found that once the CO provides specific guides, he or she must be careful not to mislead the employer into believing that the specific evidence requested is all that is needed to rebut the NOF and for the application for labor certification to be granted. The Board stated that although it is often necessary for the CO to request specific information in light of the deficiencies of the application, when the CO requires more than the specific information requested, he or she must clearly state this fact in the Notice of Findings to avoid any ambiguity. In *Miaofu Cao*, the CO requested two specific types of information from the Employer. It was not made clear from the NOF that other information, in addition to the specified information, may be needed to rebut the finding that the position was not full time. Therefore, the Employer was misled into believing that the only information necessary to rebut the NOF was answers to the two specific questions. The information requested by the CO was provided, however, the CO denied certification based on the failure of the Employer to submit information to further support the tutoring schedule which it found not credible. Due to the ambiguity created by the inclusion of two specific questions without any notification to Employer that more information was needed to rebut, the Board remanded this case to the CO for further processing. The Board instructed the CO that another NOF must be issued providing the Employer the opportunity to address the other reasons for denial.

Similarly, in this case, the CO specifically stated in the NOD he issued on October 6, 2011, that any documentation that establishes the appropriateness of the experience and reference requirements must be from credible sources and references, such as an AG Extension Service, local Farm Bureau, or educators in the agricultural field. By providing specific guidance on how to remedy its application, the CO misled the Employer into believing that in order to cure this deficiency it simply needed to obtain a letter from a more “credible” source. Accordingly, the Employer obtained a letter from an Extension Educator, Ag/4-H, Major County from the Oklahoma Cooperative Extension Service office, asserting that the Employer’s requirements were appropriate in its field. However, upon receiving this additional letter from a

“credible” source, the CO denied certification based on the letter’s failure to distinguish between H-2A and non-H-2A employers.<sup>5</sup>

Due to the ambiguity created by the NODs and the CO’s inclusion of specific guidance, without any notification to the Employer that more information was needed to rebut, I am remanding this case to the CO for further processing. The CO must provide the Employer the opportunity to demonstrate that three months of experience is a normal and accepted requirement, i.e. “not unusual or rare,” among non-H-2A employers of livestock farmworkers. *See Westward Orchards*, 2011-TLC-411, slip op. at 21 (July 8, 2011) (citing *Snake River Farmers’ Ass’n, Inc. v. U.S. Dept. of Labor*, 1991 WL 539566\*9 (D. Idaho, Oct. 1, 1991)).

### **Order**

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

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**Stephen L. Purcell**  
Chief Administrative Law Judge

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<sup>5</sup> Employer’s October 12, 2011 letter from Jim Rhodes at the Oklahoma Cooperative Extension Service can reasonably be read in this case as stating that job experience and references are consistent with the normal and accepted qualifications required by all employers of livestock workers whether these individuals are H-2A workers or non-H-2A workers. Clearly, Mr. Rhodes is the type of “credible source” for establishing the appropriateness of the requirements specified by Gosney Farms identified by the CO in his NOD. If the CO requires more specificity from this “credible source,” such as the nature and extent of his experience with the Oklahoma Cooperative Extension Service, or a more particularized explanation of the basis for his opinion, the Employer should be permitted to supplement the documentation previously provided with such information.