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Issue Date: 30 December 2011

OALJ Case No.: 2012-TLC-00009

ETA Case No.: C-11263-30085

In the Matter of:

JOHN GOSNEY,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **LEE J. ROMERO, JR.**
Administrative Law Judge

DECISION AND ORDER AFFFIRMING CO'S DENIAL OF CERTIFICATION

On December 13, 2011, John Gosney (Employer) filed a request for administrative review of the Certifying Officer's determination in the above-captioned temporary agricultural labor certification matter. *See* U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.171(a). On December 22, 2011, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (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). Based on telephonic conferences with the parties, a brief due date of December 27, 2011, was agreed upon and set.

The Procedural Background

This case is before the Office of Administrative Law Judges for a second time. On November 9, 2011, Chief Administrative Law Judge Purcell issued a Decision and Order

Vacating and Remanding CO's Denial of Certification. (AF 36-43).[1] Judge Purcell's Decision and Order and findings were based on two Notices of Deficiency dated September 23, 2011 and October 6, 2011, and a denial certification dated October 21, 2011. (AF 37-39).

On September 20, 2011, the United States Department of Labor's Employment and Training Administration (ETA) received Employer's Application for Temporary Employment Certification (ETA Form 9142) for the position of "Farmworkers, Livestock." (AF 131-144). For its minimum job requirements, Employer indicated that it required three months of experience in the occupation and an employment reference. (AF 134).

On September 23, 2011, the CO issued a Notice of Deficiency (NOD). (AF 101-104). Two of the deficiencies related to a September 8, 2011 NOD issued by the Oklahoma State Workforce Agency (SWA).[2] (AF 110-114). The CO cited 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 found that it was not normal and common practice in Oklahoma to require experience and references based on an ad hoc survey conducted by the Oklahoma SWA on September 8, 2011, which found that 8 of the 10 livestock farms contacted did not require experience and 10 out of 10 did not require references. The CO determined that Employer must remove both requirements or provide documentation substantiating the appropriateness of each requirement. (AF 97-98).

On October 3, 2011, Employer responded to the NOD by providing an e-mail written by Employer and a letter from Michele Eischen, a loan officer from Community National Bank, addressing and explaining the importance of the experience and reference requirements. (AF 94). Employer's e-mail explained that over 300 head of livestock were on the farm "at any time," which equated to an investment exceeding $300,000. Employer opined that "[t]he health of our livestock is dependent on the caretaker who can recognize illness before the animal is critically ill; recognition only comes with experience." Employer explained that the reference requirement was necessary because his business was dependent on persons with respectable work ethics who are trustworthy, timely and conscientious. Employer believed that "an individual's employment history was the most valuable in evaluating job applicants." (AF 53).

[1] In this decision, AF is an abbreviation for Administrative File.

[2] The NOD referenced a third deficiency involving temporary need, which was subsequently resolved.

The letter from Michele Eischen asserted that experience and references were necessary considerations of any employer seeking employees. She believed that the SWA survey did not take into account the size and scale of the farm Employer operated. (AF 52).

On October 6, 2011, the CO issued a second NOD. (AF 86-90). The 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 the e-mail and letter submitted by Employer, but he noted that Employer must provide documentation from "credible sources and references such as the AG Extension Service, local Farm Bureau, or educators in the agricultural filed [sic]." He also cited the Oklahoma SWA survey, finding it was "not a normal and common practice in Oklahoma to require experience." The CO again determined that Employer must remove both requirements or provide documentation substantiating the appropriateness of each requirement. (AF 89-90).

On October 17, 2011, Employer responded to the NOD with a letter from Jim Rhodes, Extension Educator, Ag/4-H, Major County from the Oklahoma Cooperative Extension Service office. (AF 77-78). The letter indicated that it was "common practice" for agricultural producers to require references and "minimal work experience." He opined that experience was necessary for the health of the livestock and safety of the worker. (AF 82).

On October 21, 2011, the CO denied certification, finding Employer failed to comply with 20 C.F.R. § 655.122(b). (AF 67-70). The CO determined that the e-mail written by Employer and the letter written by Jim Rhodes "fail[ed] to distinguish between H-2A and non-H-2A employers." (AF 69). The CO found that Employer was given three opportunities to remove the experience and reference requirement or substantiate how they are consistent with the normal and accepted qualifications required by non-H-2A employers, but he found that Employer had failed to do either. (AF 69-70).

On October 24, 2011, Employer appealed the October 21, 2011 denial. (AF 45-66). Employer asserted that the CO based the denial on its failure to "substantiate how the requirements are consistent with the normal and accepted qualifications required by non-H-2A employers," a requirement not found in either NOD. (AF 46).

On November 9, 2011, Judge Purcell issued a Decision and Order Vacating and Remanding CO's Denial of Certification. (AF 36-43). He found that the NOD must state the

reasons why the job order failed to meet the criteria for acceptance, and offer the employer an opportunity to submit a modified application. (AF 41). He determined that the CO's specific guidance on how to remedy the application misled Employer into believing it simply needed to obtain a letter from a more credible source to cure the deficiencies. (AF 42). He found that Jim Rhodes was a credible source, and Employer should be permitted to supplement the documentation previously submitted with the specificity required by the CO to include further elaboration by Rhodes concerning the nature and basis for his conclusion. (AF 43, n. 5).

The Administrative File

Following the November 9, 2011 Decision and Order, the CO issued a third NOD on November 17, 2011. The 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 noted that Employer's response to the first NOD failed to substantiate how the requirements were consistent with normal and accepted requirements of non-H-2A employers in that the documents were not from credible sources. The CO noted again that the e-mail written by Employer and the letter written by Jim Rhodes failed to distinguish between H-2A and non-H2A employers. He stated, "The Chicago NPC requires documentation relevant to non-H-2A agricultural employers to establish whether the requirements listed in the job offer are normal and accepted requirements among non-H-2A employers." (AF 31). The CO urged Employer to remove the experience and reference requirements, or submit documentation demonstrating that the requirements are normal and accepted among non-H-2A employers. (AF 32).

On December 5, 2011, the CO received the Employer's response to the third NOD. (AF 14-24). Employer submitted a letter from Jeffrey W. Hickman, Speaker Pro Tempore, Oklahoma House of Representatives. Representative Hickman, a "fellow farmer," expressed a belief that the requirement of three months experience and references was "normal and consistent with employment criteria for workers on livestock farms." He noted that farm work can be dangerous if the worker lacks experience, and believed experience requirements benefited employees by insuring their safety. (AF 19, 21). Employer also submitted a letter written by Jim

Reese, Secretary of Agriculture for the State of Oklahoma. He stated that he possessed "broad knowledge of the agriculture sector in Oklahoma." He "unequivocally" believed "a reference and three months experience is at a minimum consistent with the normal and accepted requirements for employment of both H-2A and non-H-2A livestock farm workers in Oklahoma." He noted that safety of employees and animals necessitated an experience requirement. (AF 20).

On December 12, 2011, the CO denied certification, finding Employer failed to comply with 20 C.F.R. § 655.122(b). (AF 9-13). The CO determined that the letters written by Jeffrey Hickman and Jim Reese "absent any evidence to quantify the statements contained within" were insufficient to overcome the SWA survey. (AF 4-5). He concluded that Employer failed to demonstrate that three months of experience and references were normal and accepted requirements. (AF 5).

On December 13, 2011, Employer appealed the December 12, 2011 denial. (AF 1-3). Employer asserts that the CO erred in failing to consider the letter from Michele Eischen or the e-mail from Employer because both were "respected, experienced, and knowledgeable in the area of livestock and agricultural production." (AF 1). Employer argues that the letter written by Jim Rhodes was both credible and established the appropriateness of the job requirements for "agricultural producers in general." Employer asserts that the documents submitted following the first and second NOD substantiated the appropriateness of the job qualifications found in its application. Employer avers that the letters written by Jeffrey Hickman and Jim Reese demonstrate that the requirements are normal and accepted among non-H-2A employers, as required by the third NOD. (AF 2). Employer notes that the SWA survey failed to state the type of agricultural businesses surveyed, success of the businesses, size of the operations, dollars invested in the operations and liability of the owners in the operations. Employer argues that the minimum qualifications help in protecting its investments and managing the safety of its employees and livestock. (AF 3).

On December 23, 2011, by facsimile, Employer submitted a supplemental letter with a copy of an e-mail received from the Chicago National Processing Center (NPC) in Kinzler Rocking K Farms, C-11350-30917#H22. The e-mail refers to "a survey conducted by the Oklahoma SWA in which reference requirements were determined to be normal and common," but "experience" was not. Employer argues the e-mail is in direct conflict with the denial in the

instant case.[3] Employer contends the letters provided by "experts in Oklahoma agriculture," which support both three month experience and reference requirements have been rejected and ignored, whereas state surveys have been deemed the prevailing state practice. It is averred that the survey fails to compare equal operations and provides inaccurate results.

On December 27, 2011, by facsimile, the Associate Solicitor for Employment and Training, on behalf of the CO, filed a brief in support of the decision denying certification. It is argued that the CO correctly concluded the Employer's three month experience requirement was not justified since such a requirement was not utilized by the "vast majority" of non-H-2A employers in the same occupation as surveyed. The CO relies upon a showing of 80 percent of the non-H-2A livestock employers surveyed (8 of 10) which did not require experience. The CO argues that the letters submitted by Employer supporting the experience requirement are inconsistent with the SWA survey and offer no grounds for believing the survey is incorrect. Thus, the Employer offered no evidence sufficient to warrant a rejection of the survey or any suggestion that the survey results are inaccurate. Further, it is noted that Employer did not take advantage of the suggestion in Judge Purcell's Decision to seek elaboration from the Cooperative Extension office concerning the nature and basis for its conclusion. It is noted that the rebuttal of the accuracy of the SWA ad hoc survey had never been explicitly raised by the CO.

Discussion

It is the Employer's burden to show that certification is appropriate. 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 affirmatively 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**

[3] The Employer's brief included this e-mail which the Employer did not previously submit with its response to the NOD. The H-2A regulations restrict administrative review to the basis of the written record, and review cannot include new evidence submitted on appeal. 20 C.F.R. § 655.171(a). Therefore, I am unable to consider the evidence.

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 Deficiencies, 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). 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 livestock farms contacted do not require experience and 10 out of 10 of the non-H-2A farms do not require references. The ad hoc survey was conducted to meet the requirements particular to livestock farms since surveys of agricultural employers, of nursery & tree and grain and oilseed crop farmers, conducted in May 2011, demonstrated that it was not a "normal and common" practice to require prior experience or references. (AF 115). 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.

Subsequent to the November 9, 2011 Decision and Order Vacating and Remanding CO's Denial of Certification, the CO issued a third notice of deficiency. In response, Employer submitted a letter dated November 28, 2011, from Jeffrey W. Hickman, Speaker Pro Tempore, Oklahoma House of Representatives in support of its position that the requirement of three months experience and references is "normal and consistent" with employment criteria for workers on livestock farms. (AF 26). Similarly, Jim Reese, the Secretary of Agriculture, State of Oklahoma, wrote a letter stating unequivocally that a reference and three months experience is at a minimum consistent with the normal and accepted requirements for employment of both H-2A and non-H-2A livestock farm workers in Oklahoma. (AF 27). The undersigned deems both Hickman and Reese to be credible sources.

On December 12, 2011, Employer's application was again denied for failing to remove the experience and reference requirements or substantiating how the requirements 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. Thus, Employer's application for "three farm workers, Farm and Ranch animal job opportunities" was denied.

The primary issue in this matter is Employer's requirement that applicants have three months of experience and an employment reference. The CO relies upon a SWA survey conducted for "farmworker, livestock" (AF 115) on September 8, 2011, which does not provide the specificity set forth in surveys conducted in May 2011 for "produce farming" (AF 117-119), "grain and oilseed crop farming" (AF 120-122), and "nurseries/tree farms." (AF 123-125). The relevant ad hoc survey does not include the number of surveys sent or the number of responses received nor any "Employer information" such as number of employees employed or the job descriptions of such employees. Although ten livestock farms were contacted there is no indication of the number of livestock farms proportionally which were available to be contacted.

I have carefully considered the ad hoc survey, and although it provides some evidence of the absence of experience and reference requirements, I find it is simply too vague and offers only generalities without details of the job duties surveyed to be a legally sufficient basis for (1) the CO's conclusion that experience and references are not a normal or accepted requirement or (2) the CO's rejection of the instant application. The regulations do not define "normal and accepted." Case law would support a conclusion that normal and common "mean situations which may be less than prevailing, but which clearly are not unusual or rare." See Snake River Farmers' Ass'n, Inc. v. U.S. Dept. of Labor, 1991 WL 539566, *9 (D. Idaho, Oct. 1, 1991).

In comparison, of the minimal responses received from a much larger surveyed number of farms in the May 2011 surveys, although a "majority" of the respondents do not require experience, some do; on average 42 percent to 50 percent of the respondents required references. There is simply no probative evidence in the ad hoc survey or the CO's explanation to indicate that experience is not necessary for the "Farmworkers, Farm and Ranch animal job opportunities" as sought in the Employer's application.

Accordingly, I must evaluate other record evidence to determine whether three months of experience and an employment reference are normal and accepted requirements among non-H-2A farmworkers, farm and ranch animal workers.

I find the Employer's argument compelling that the job duties encompassed in his application enhance the health and well-being of his livestock and instill safety in the operation

of equipment which could be dangerous to workers and livestock. As observed in Westward Orchards, et al., 2011-TLC-00411 (July 8, 2011):

> When an ALJ has found the SWA survey to be invalid and not probative on the issue of normal and accepted practices, the ALJ has considered alternative evidence from the DOT in order to determine whether the job requirement at issue is normal and accepted among non-H-2A employers the same or comparable occupations and crops. See Jay R. Debadts & Sons Fruit Farm, 2008-TLC-38 (July 3, 2008); Strathmeyer Forests, Inc., 1999-TLC-6 (Aug. 30, 1999); Tougas Farm, 1998-TLC-10, USDOL/OALJ Reporter (May 8, 1998); Hoyt Adair, 1996-TLC-1, USDOL/OALJ Reporter (April 19, 1996). The caselaw establishes that the DOT listing for an occupation is probative evidence regarding whether an occupational requirement is a normal and accepted qualification. See Strathmeyer Forests, Inc., slip op., at 4; Tougas Farm, USDOL/OALJ Reporter at 6. While reliance solely on the OES/O*Net job classification is disfavored because it does not account for variation by state or by crop, given that neither of the surveys in the record provide any probative evidence, I will consider the OES/O*Net occupation and all conflicting or corroborating evidence in order to determine whether the experience requirement is normal and accepted.[4]

I have reviewed the Employer's letters of support from Employer, Ms. Eischen, Mr. Rhodes, Representative Hickman and Secretary of Agriculture Reese and consider each as a credible source. However, I also find compelling a landmark BALCA decision under the permanent labor certification program which concerned what constitutes "documentation" that I conclude is equally relevant to temporary labor certification cases. BALCA wrote: "[W]here a provision of the regulations requires information to be furnished in a specified form, *e.g.*, documentation of experience "in the form of statements from past or present employers,"' §656.21(a)(3)(J), the regulation controls. In the absence of such a specific provision, where a document has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the document, if requested by the Certifying Officer, must be adduced. In all other cases, *e.g.*, where an employer is required to prove the existence of an employment practice or the performance of an act and its results, written assertions which are **reasonably specific and indicate their sources or bases shall be considered documentation.** This is not to say that a

[4] The O*Net is a database containing information on hundreds of standardized and occupation-specific descriptors. O*Net job descriptions contain several standard elements, one of which is a "Job Zone." An O*Net Job Zone "is a group of occupations that are similar in: how much education people need to do the work, how much related experience people need to do the work, and how much on-the-job training people need to do the work." The Job Zones are split into five levels, from occupations that need little or no preparation, to occupations that need extensive preparation. Each Job Zone level specifies the applicable SVP. http://www.onetonline.org/help/online/zones.

certifying officer must accept such assertions as credible or true; but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve." GENCORP, 1987-INA-659 (Jan. 13, 1988) (en banc).

I find the letters submitted by Employer arguably constitute "documentation." However, I find that none of the letters reasonably provide a specific factual basis or source for the beliefs expressed. A mere statement of familiarity with a job requirement, such as the beliefs offered in each letter, is not enough. See TRI-P'S CORP., dba JACK-IN-THE-BOX, 1987-INA-686 (Feb. 17, 1989) (en banc) (an employer's statement that prior familiarity with operations is a normal requirement for managers of fast-food restaurants was found not to be specific and not to indicate sources or bases, such that it did not meet the documentation definition from *Gencorp*). In CARLOS UY III, 1997-INA-304 (Mar. 3, 1999) (en banc), the Board held that a **bare assertion without either supporting reasoning or evidence** is generally insufficient to carry an employer's burden of proof. There is no corroborative evidence in support of any of the opinions expressed in Employer's proffered letters. The documentation is merely opinion letters. None of the letters demonstrate how they are well-reasoned or otherwise have a factual foundation upon which credence could be extended. Furthermore, Employer has not explained why, alternatively, additional elaboration from Mr. Rhodes was not pursued in support of its application which, if obtained, may have provided a reasoned, factual basis for its contentions.

Notwithstanding the foregoing, the OES/O*Net listing for "Farmworkers, Farm, Ranch and Aquacultural animals" shows training required may range from a few days to a few months to achieve average performance. I find this additional probative evidence supportive of the requirement for three months of experience.

However, in view of the totality of the record evidence, I find Employer has not established that three months of experience and an employment reference are normal and accepted requirements for non-H-2A employers in Oklahoma.

Accordingly, I find and conclude that the CO's determination to deny the instant application because of the job experience and references requirements requested must be affirmed, and, therefore is a legally sufficient and probative basis for denial. See Westward Orchards, et al., supra, slip op. 23-25.

Conclusion and Order

Based on the administrative file and the facts of the case, I find that Employer has not met its burden of establishing eligibility for the H-2A temporary labor certification program.

In light of the foregoing, **IT IS HEREBY ORDERED** that the Certifying Officer's determination in the instant case be **AFFIRMED.**

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LEE J. ROMERO, JR.
Administrative Law Judge