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Issue Date: 14 August 2012

OALJ Case No.: 2012-TLC-00081

ETA Case No.: C-12192-352546

In the Matter of

MT. CLIFTON FRUIT COMPANY, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Appearances: Wendell Hall, Esq.
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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 10, 2012, Mt. Clifton Fruit Company, LLC ("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 August 1, 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 July 10, 2012, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from the Employer for temporary labor certification for 90 workers. (AF 34-77).[1]

On July 19, 2012, the Certifying Officer ("CO") issued a Notice of Deficiency ("NOD"). (AF 8-13). The NOD stated:

> The employer states on page 4 of the EA Form 790- Attachment 1 and on Attachment 1, page 2 of the ETA Form 9142, that applicants must be able to furnish affirmative job references from recent employers operating comparable operations establishing acceptable previous experience. However, the employers requirement that domestic applicants provide an affirmative e.g., positive, reference is unacceptable because it violates the employers 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 11).

[1] 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.

The Employer responded on July 24, 2012, requesting de novo review. (AF 1-7). The Employer argued that in *Norman Industries* BALCA did not find that requiring a positive reference requirement was unreasonable or unlawful, only that the way the employer in that case implemented the requirement suggested bad faith. (AF 3-4). The Employer stated that the requirement for a positive reference is lawful under the Immigration Reform and Control Act of 1986, Pub. L. 99-603, § 301, 100 Stat. 3359 (1986) and the H-2A regulations, which expressly preserve employers' duty and discretion to set and confirm qualifications. (AF 3).

POSITION OF THE PARTIES

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"[2] 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.

[2] This case was appealed and is before the undersigned for decision along with five similar cases. The CO submitted one brief for all six cases. However, unlike the other cases, the word "affirmative" does not appear in the language used by the Employer in this case on its ETA Form 790 or 9142. The CO did not address this difference in his brief, although he was made aware of it by the Virginia Employment Commission. (AF 18).

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

The language at issue in this case appears in the Employer's job offer and job order, both of which state: "Applicants must be able to furnish job references from recent employers operating comparable operations establishing acceptable prior experience." ETA Form 790, Attachment 1, page 4 (AF 54, 92); ETA Form 9142, Attachment 1, page 1 (AF 44).

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 reference requirement 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 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.

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 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