U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office
and Courthouse
Room 409
Boston, Massachusetts 02109

BLANCHET LOGGING & LUMBER CO.

and

GILBERT & FRERES, INC.
Applicants

Case No. 82-TAE-6

TEMPORARY ALIEN EMPLOYMENT
CERTIFICATION

DECISION AND ORDER

By separate mailgrams dated May 21, 1982, the Regional Administrator for Employment and Training (RA) of the U.S. Department of Labor notified each of the above named companies that their applications for certification allowing the use of foreign workers for temporary employment in logging operations in northern Maine were denied. Blanchet Logging had proposed to employ 56 alien workers in logging operations beginning June 14, 1982 through April 30, 1983. Gilbert & Freres had proposed to employ 21 aliens starting June 1, 1982 and continuing through December 31, 1982.

The RA's denial notices stated essentially:

1. That rule 210(a) of the governing regulations (codified at 20 CFR §655 et seq.) authorizes denial of an application for certification if the applicant (employer) has failed to comply with the terms of a prior year's certification;

2. That each applicant had failed to comply with the so-called "3/4 work guarantee" in the prior 1981-1982 certification period, contrary to Rule 202(b)(6)(i);

3. That therefore each application for certification for the current logging season was being denied;

4. That "to he eligible to submt a request for labor certification for the 1982-1983 cutting season," the employer would have to prove it had paid back wages to certain former employees, as calculated in an audit performed by the Maine Job Service; and

5. That, in accordance with the provisions of Rule 210(a), the employers could request a hearing on the RA's decision within 30 days.

By letters dated May 21, l982 and June 2, 1982, respectively, the employers appealed. The June 23, 1982 memorandum of transmittal from the RA to this Office states as follows:

> "The two requests are submitted simultaneously, at the request of the respective attorneys because the basis for denying labor certification is the same both cases. The employers were granted labor certification for the 1981-1982 season and failed to provide employment for their employees in accordance with the provisions of 20 CFR 655.202(b)(6)(i)."
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> "The 1981-1982 Logging Season payrolls of both Gilbert & Freres, Inc. and Blanchet Logging & Lumber Co. were audited, The results of these audits provide evidence that both employers failed try meet the 3/4 guarantee provisions of 20 CFR 655.202(b)(6)(i). The Regional Administrator, in consideration of 20 CFR 655.202, has denied applications for labor certification for the 1982-1983 logging season to which the attorneys for both Employers raise objections and request review.

1. Procedure. The first question to be resolved is which of the two review processes provided by the governing regulations should be applied for these applications. The cases have been referred to this office by the RA in accordance with Rule 210. That Rule provides a 30-day period for a party to appeal an unfavorable RA decision, and then provides, by specific reference to 20 CFR §658.421, et seq., a full notice and hearing adjudication process as contemplated under Section 5 of the Administrative Procedure Act, 5 USC §554.

The other decision review Process provided by the temporary alien employment (TAE) regulations is stated in Rule 212. Rule 212 prescribes a specially abbreviated process with strict time limits applying to all participants. The RA must advise the employer whose application is denied that it has 5 calendar days to appeal. The employer must appeal within that 5-day period. The RA must certify the file to the Chief Judge "by means normally assuring next day delivery." The judge assigned the case is specifically directed not to remand the case or receive any additional evidence, and is directed to issue a decision within 5 working days. The judge's decision then is the final decision of the Department of Labor.

On examination of the RA's determinations here, in issue, in light of the express language of Rule 210 and its context within the TAE regulations, and in light of the rule-making history of Rule 212, I conclude that the RA's referral of these denials for review under Rule 210 is in error. The only legally sufficient process for review of any denial of a TAE certification application as to logging workers in Rule 212.

In general, the question whether an RA should grant TAE certification turns on matters considered at 3 stages of processing. Initially, the RA most determine whether the application (a) is timely filed, (b) agrees to certain specific conditions of employment; and (c) states various specific assurances, including an agreement to cooperate with State and federal employment officials in the active recruitment of U.S. workers. Next, if the RA finds the application satisfactory in these respects, a 60-day recruitment period is fixed by the RA. Then, at the end of the recruitment period, the RA decides to grant or deny certification,

in whole or in part based on considerations of (1) whether there are adequate numbers of U.S. Workers available for these jobs, and (b) whether the employer has adequately recruited U.S. Workers.

The RA is empowered by the regulations to deny a labor certification at any one of these three processing stages. In each specific grant of power to the RA to deny an application, the RA is directed to advise the applicant of the abbreviated Rule 212 review process. See Rules 204, 205 and 206.

On its face, Rule 210 concerns itself with something quite different from the granting or denial of a pending application. Rule 210 is a debarment provision, one which authorizes the RA to declare a particular employer to be ineligible to apply for a temporary alien worker certification, if that employer has failed to live up to the terms of a prior or outstanding certification. The effective debarment of a particular employer under Rule 210 requires an on-the-record evidentiary hearing, and adjudication within the meaning of Section 5 of the Administrative Procedure Act.

A review of the rule-making history behind the adoption of the present TAE regulations supports a literal reading of the regulations that the abbreviated process must be used for any denial of a certification application. The Department of Labor's current TAE regulations applying to agricultural and logging workers in the U.S. were made effective on April 10, 1973, following notice, comment, and public hearings on a set of proposed regulations published on January 1 , 1977. Neither the proposed TAE regulations nor the preexisting regulations (then codified at 20 CFR 602.10) provided for an internal DOL review process comparable with current Rules 210 or 212.

In its evaluation of the public comment on the proposed regulations, the DOL made it clear that time is of the essence for all participants in the certification process for temporary alien employment. Worker representatives argued that the regulations should require as much as a 6-month lead time in the application process so that U.S. workers could be recruited adequately for the jobs in issue. Employers argued that they could not estimate their job needs so far in advance, and that much shorter application time periods were necessary.

The DOL decided to keep the 60-day recruitment period contained in the prior rules, but otherwise to balance the conflicting interests by (a) imposing more specific procedures for processing the labor certification applications, including a requirement that the RA will grant or deny by the estimated date of need, whichever is later. Compare Rules 201 and 206. The DOL commented that the new rules would result in "a more regular, systematized" recruitment process, "so that employers, the State Employment Service agencies, and workers will have the security of a well defined procedure."

The DOL concluded, at 43 Federal Register 10306, at 10307 (March 10, 1978):

> . . . During the hearings, for example, many employers urged the Department to either grant or deny temporary labor certification in sufficient time for them to transport alien workers to their worrksites or to petition the INS for visas after the Department's denial of certification. The Department, therefore, has imposed time limits on both the recruitment of U.S. workers by the employment service system an on its temporary labor certification approval/denial process. In

addition, the regulations provide for an expedited review of any denial of certification by a Department of Labor Hearing Officer.

I conclude that the RA may proceed to deny a temporary alien worker certification, such as those involved here, only in a process which triggers the expedited 5-day review provided by Rule 212.

Therefore, although these applications have been referred to this Office by the RA for a hearing in accordance with the APA adjudication process provided by Rule 210, the RA's denial of these applications gives these employers the right to that special Rule 212 review process. Accordingly, to the degree practicable in all the circumstances, I will proceed to provide the kind of review contemplated Rule 212, a process termed there as "an administrative-judicial review".

2. The Decision to Deny Certification. The RA expressly denied the applications because both employers had failed to meet the 3/4 guarantee provisions imposed on applicants by Rule 202(b)(6)(i). Such a provision was included in the terms of the certification held by these two employers during their logging operations in the prior cutting season.

Rule 210 empowers the RA, to declare an employer ineligible to apply for a labor certification, but the power is expressly made subject to review. when there is cause to believe that an employer has not lived up to the terms of a previously issued certification, the RA is directed in Rule 210 to investigate the matter. The, the rule provides:

> . . . If the RA concludes that the employer has not, complied with the terms of the labor certification, the RA may notify the employer that it will not be eligible to apply for a temporary labor certification in the coming year . . . . (20 CFR §655.210(a)).

Such determination then triggers a 30-day period for appeal and the right to an APA Section 5 adjudication, a judicial-type of evidentiary trial.

Rule 21.0 210(b) then provides:

> No other penalty shall be imposed by the employment service on such an employer other than as set forth in paragraph (a) of this section (20 CFR §655.210(b)).

I conclude that the RA's use of his Rule 210 determination to deny these pending applications is not a legally sufficient basis for denial. The only penalty permissible under Rule 210 is a debarment, a finding of ineligibility for "the coming year." The "well defined procedure" called for upon the DOL's adoption of these TAE rules provides a umber of very specific bases for denial an application, in Rules 201, through 206, and I find that those latter rules provide the only legally sufficient bases for denial.

Moreover, the use of Rule 210 to deny an application, particularly at the very end of the recruitment process and therefore at the onset of need for the alien workers, would effectively deprive these employers, of the right to the evidentiary hearing provided in Rule 210. On the face of things, applicants here have been offered an evidentiary hearing to contest their alleged violation of Rule 210, but ironically, if they seek

to exercise that right in a meaningful way, they will be blocked out of a significant portion of the logging season. The specific procedural rules imposed under Rule 210 for conducting such a hearing provide a sequence of notice and filing requirements that limit the ability to expedite the process. The factual and legal issues raised by the RA probably involve substantial complexity. It is alleged, for example, that Blanchet owes former workers a total of $248,890 in back wages for the prior season. The RA contends that that employer must produce evidence of payment of those claimed back wages in order to be eligible to request certification for the cutting season which began June 1.

Here, in fact, the Employer's applications were filed on March 11, 1982, respectively. Later in March each was notified by the RA that the application was timely and did contain the necessary conditions of employment. Each was then instructed to go ahead with detailed procedures to effect recruitment of U.S. workers for the prescribed recruitment period, and to advise the RA's in writing, by May 5 and May 21, respectively, of the results of the recruiting.

In the sequence of events presented here, therefore, a denial of these applications based on a determination of ineligibility under Rule 210 is not legally sufficient. Such a denial is an effective debarment of these applicants. The effective imposition of a Rule 210 debarment is the kind of sanction that would require some substantially greater decree of due process protection than is available under Rule 212. For a discussion of the kinds of elements of fairness and practicability that must be evaluated in judging the appropriate level of due process procedure that must be afforded in comparable administrative determinations, see Gross v. Lopez, 419 U.S. 565 (1975) and Matthews v. Eldridge, 424 U.S. 319 (1976).

The next issue to be considered is the substantive disposition of the applications. Since the RA's danial was based exclusively on the 3/4 work guarantee, I infer that each employer had satisfied the recruitment requirement within the meaning of Rule 205. Similarly, I infer that the record before the RA demonstrated there were not sufficient U.S. workers qualified and available to perform the work in issue. Both employers had been permitted to use substantial numbers of alien Workers in the prior cutting season. In other words, I conclude that those applications would have been granted but for the RA's determination under Rule 210.

Based upon all of the above considerations it is my conclusion that the decision of the RA in these two applications should be reversed, and that a temporary labor certification should be issued. Such a course will allow these employers promptly to seek from the Immigration and Naturalization Service necessary non-immigrant visas for the alien workers they need to employ. The final determination, of course, whether to grant a non-immigrant petition for admission for the purposes expressed by these employers is solely the responsibility of the INS. That agency provides a procedure for evaluating such petitions. 8 CFR 214.2(h)(3). The role of the DOL is to advise whether there are sufficient qualified workers available to do the work proposed and whether employment of the aliens will adversely affects wages or working conditions of similarly employed U.S. workers.

Accordingly, it is ORDERED:

1. That the decisions of the Regional Administrator denying these applications are reversed; and

2. That with respect to the application of Blanchet Logging & Lumber Co. to employ 55 loggers and 1 camp cook for the period between June 14, 1982, and April 30, 1983; and the application of Gilbert & Freres, Inc., to employ 18 loggers and 3 operating engineers between June 1, 1982 and December 31, 1982, it is hereby CERTIFIED to the Immigration and Naturalization Service by the Department of Labor, for the purposes expressed at 8 CFR §214.2(h)(3)(i), that there are not sufficient U.S. workers who are qualified and available to perform the work and that the employment of aliens in these jobs will not adversely affect the wages and working conditions of similarly employed U.S. workers.

ROBERT M. GLENNON
Administrative Law Judge

Date: July 20, 1982
Boston, Massachusetts

RMG:pm