



In the Matter of

ANGELO PALOMBO, PALOMBO FARMS
OF COLORADO, INC.

Case No. 83-TAE-3

DECISION AND ORDER

This is a decision in response to a request by employer Angelo Palombo, Palombo Farms of Colorado, Inc., for expedited administrative judicial review, pursuant to 20 C.F.R. §656.212, of a denial of his application for temporary labor certification.

On January 5, 1983, Angelo Palombo filed an application for temporary labor certification for twenty-five vegetable workers. The date of need specified was June 26, 1983. On June 3, 1983, a United States Department of Labor, Employment and Training Administration, Regional Administrator (RA) denied certification on the basis of the availability of U.S. workers to fill the employer's job opportunities.

By telegram on June 9, 1983, the employer appealed the RA's decision to deny certification. The RA has moved that the employer's request for review be dismissed because it was untimely. The regulations at 20 C.F.R. §655.204(d)(2) provide that the employer has five calendar days from the date of the RA's denial letter in which to telegraph a request for review to the Office of Administrative Law Judges. Technically, The employer took six days to telegraph his request. the employer's request is untimely; however, I will accept his request for review because the request was only one day late and the delay was not prejudicial. Further, the denial letter was dated and mailed on a Friday, and received on a Monday. The employer, acting without an attorney, may have been unaware that the intervening weekend days were included in the five days allowed to request review of a denial.

After reviewing the case file, denied alien labor certification. I conclude that the RA properly The RA denied the employer's application because of the availability of U.S. workers recruited by the Texas Employment Commission. The employer argues that he has had problems with the U.S. Commission. workers recruited by the Texas Employment He states that in his previous application for alien labor, he had been informed of the availability of these workers but that only four reported to work. None of the four remained. The employer does not explain, however, how he can guarantee that the alien workers he may hire will report to and remain at work. He cannot reject available U.S. workers on the general premise that the ones he has hired in the past have not been satisfactory. The purpose of these regulations is to protect U.S. workers by requiring employers to provide U.S. citizens with the opportunity to apply for available. States, the employer must try to hire them before hiring alien workers.

As was stated in Angelo Palombo, Palombo Farms of Colorado, Inc., 83-TAE-2 (April 21, 1983), the employer cannot reject en masse available and experienced vegetable workers recruited from Texas. 20 C.F.R. §655.206(a) provides:

The RA shall also count as available any U.S. worker who has applied to the employer (or on whose behalf an application has been made), but who was rejected by the employer for other than lawful job-related reasons....

The RA determined that the employer's rejection of the U.S. workers was not for lawful job-related reasons. Although the employer was given a list of more than twenty-five workers who were presumably available for hire, he resisted employing any from the list.

Under 20 C.F.R. §655.212(a), a Hearing Officer may only consider the legal sufficiency of the record upon which the denial of labor certification was based. As the record is legally sufficient for a determination that the employer failed to demonstrate the shortage of U.S. workers to fill positions as vegetable workers, I find that the RA was correct in denying labor certification.

This is the final decision of the Department of Labor on this matter. Further review may be obtained by filing a petition with the District Director, Immigration and Naturalization Service in your geographical area pursuant to 8 C.F.R. §214(j)(3)(i). This decision is being transmitted to Luis Sepulveda, the Regional Administrator, United States Employment Service Administrator, the Associate Solicitor for Employment and Training, and the Director of the Immigration and Naturalization Service.

EVERETTE E. THOMAS
Deputy Chief Judge

Dated: 17 JUN1983
Washington, D.C.

EET:ERE:jeh