Date: AUG 9 1991
Case No.: 91-TAE-4

In the Matter of:

SUZUKI FARMS,
Employer

H. Reid Shaw, Esquire
For the Employer

Before: JAMES GUILL
Associate Chief Judge

DECISION AND ORDER

This matter arises under Part 655 of Title 20 of the Code of Federal Regulations, Subpart B, which governs the labor certification process for temporary agricultural employment in the United States of nonimmigrant foreign workers (H-2A workers). Pursuant to 20 C.F.R. §655.112(a)(2), this Decision and Order constitutes the final decision of the Secretary of Labor.

Background

On February 13, 1991, Employer Suzuki Farm, applied for labor certification for temporary agricultural employment of two foreign workers for an anticipated period of employment of ten months, i.e., from March 1, 1991 to December 31, 1991 (AF 77-80). One month later, on March 13, 1991, this application was withdrawn (AF 75).

Approximately one month later, on April 11, 1991, Employer filed a second application for what appears to be the same work, for an anticipated nine month period of employment from June 15, 1991 to March 15, 1992 (AF 67-74). The Regional Administrator (RA) for the Employment and Training Administration in Philadelphia refused to accept the application on the ground that the availability of U.S. workers could not be tested due to Employer's failure to offer benefits, wage rates and/or working conditions required under the regulations (AF 55-62). The record does not indicate whether Employer attempted to modify its application to comply with the deficiencies found by the RA, or that Employer requested administrative review by the Office of Administrative Law Judges. In fact, it appears that Employer abandoned this application because a third application was submitted on June 27, 1991 (AF 34-54).

This third application listed an anticipated ten month period of employment from August 15, 1991 to June 15, 1992 (AF 40). The job title was listed as "Planting/Cropping," and the job duties were described as:

> Drives and operates farm machinery to plant vegetables such as cucumbers and eggplants: attach farm implements such as plows, disks, and fertilizer applicator to machinery and prepare soil for planting and fertilizing. Thins, hoes and weeds plants using hand implements. Irrigates land to provide sufficient moisture for crop growth, using appropriate irrigation methods suitable to that specific crop.

(AF 38). In regard to its intended recruitment efforts, Employer stated:

> I will place a job advertisement in the leading county and State newspaper. I will also consider any qualified individual referred to me by the Job Service. I am willing to distribute job order in a multi-state area where qualified domestic workers are available.

(AF 39).

On July 1, 1991, the RA refused to accept the application for consideration (AF 29-33). Among several grounds for rejecting the application, the Administrator found (1) that it was unclear whether the work is temporary or seasonal in nature and (2) that the application failed to provide any information on when or where workers interested in employment could contact Employer.

On July 15, 1991, Employer submitted a modified application, and materials supporting the modifications (AF 13- 28). Employer requested that the date of need be changed to August 26, 1991 to December 26, 1991. It indicated that from January to March, the farm is engaged in planting seedling, cultivating, and propagating in its greenhouses. From April to December, the farm work involves plowing, transplanting, cultivating, fertilizing, weeding and harvesting (AF 15). Employer also attached documentation of the farm's work schedule consisting of a calendar of proposed work activity from August 1991 to February 1992 (AF 17-25).

In regard to the referral deficiency, Employer modified the application to provide:

> Referrals are to be directed to me [Kiyonobu Suzuki) at Suzuki Farms, 405 Weaver Drive, Salisbury, MD 21801 Tel. # (301) 546-1826 Monday to Friday after 4:00 P.M.

The RA considered Employer's modifications, but found that two of the responses -- those regarding the temporary or seasonal nature of the work and those regarding the referral of applicants -- were insufficient to permit acceptance of the application. Specifically, the RA found that Employer had not provided evidence that its need for H-2A workers is temporary or seasonal in nature. This finding was based in part on the fact that Employer had-submitted three applications in 1991:

> The period of employment for the three applications, which were all for the same crop activity, spanned the period March 1, 1991 to June 15, 1992, suggesting that your need was for permanent workers. For your current application, you modified

> the period of employment from August 15, 1991 - June 15, 1992 to August 26 - December 26, 1991. At the same time, the job responsibilities for the period April - December and January - March are listed in item 1 of the modified application, once again suggesting your need is for permanent workers. In your modification package you also provided a work schedule which spans the period August 1991 through February 1992, suggesting that the modified period of employment does not accurately reflect the specifics of these job opportunities, including whether or not these are temporary or seasonal positions as defined by the regulations.

In regard to the referral deficiency, the Administrator noted that the regulations require positive recruitment of U.S. workers. 20 C.F.R. §655.103(d). He concluded that Employer's condition that referrals be made after 4:00 p.m. "may adversely effect U.S. workers in that the Employment Service staff in Maryland as well as other States would have a difficult time contacting you to arrange for the referral of workers [because most Employment Service offices operate during normal business hours of 9:00 a.m. to 5:00 p.m.]." The Administrator also stated that the staff of the Salisbury Employment Service office had tried unsuccessfully to contact Mr. Suzuki numerous times without success.

On July 29, 1991, Employer requested review by the Office of Administrative Law Judges (OALJ) (AF l-4). In the request for review, Employer argued that, although the farm operates throughout the year because he has a greenhouse, his permanent workforce needs to be supplemented by field workers during the Spring, Summer and Fall:

> Since the need is for the nine month period covering March to December, I had neglected to take into consideration when the previous applications were denied that the season ends in December. I had only concentrated on the fact that I needed temporary workers for the nine months the field is being utilized.

Employer stated that the purpose of the work schedule had been to show the difference in work load during the winter season (December-March) from that of the remainder of the year when much of the activity takes place in the fields. Employer's attorney argued that Mr. Suzuki is very busy because he is sole manager of the Suzuki Farms, but that he "is very anxious and willing to participate in the active recruitment of U.S. workers despite the hectic schedule he keeps. According to the attorney, Mr. Suzuki has installed an answering machine to take all referrals.

The Administrative File was assembled and transmitted to OALJ by the RA on August 5, 1991. OALJ received the File on August 6, 1991. In response to inquiry by the undersigned, Counsel for Employer stated on August 7, 1991 that its request was for review based on the administrative record. On August 8, 1991, the Office of the Solicitor submitted a brief on behalf of the Regional Administrator pursuant to 20 C.F.R. §655.112(a)(2). Employer did not submit a brief, but requested on August 9, 1991 to submit a reply brief, which request was denied.

Discussion

Temporary or Seasonal Employment

Section 655.101(g) provides that the employer shall set forth on the application sufficient information concerning the job opportunity to demonstrate to the RA that the need for the worker is "of a temporary or seasonal nature", as defined at §655.110(c)(2) of this part. Job opportunities of 12 months or more are presumed to be permanent in nature. Therefore, the RA is required not to grant a‘temporary alien agricultural labor certification where the job opportunity has been or would be filled by an H-2A worker for a cumulative period, including temporary alien agricultural labor certifications and extensions, or 12 months or more, except in extraordinary circumstances.

Section 655.100(c)(2) defines "temporary or seasonal basis" by reference to 29 C.F.R. §550.20, the definition of "on a seasonal or temporary basis" found in the implementing regulations for the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). That definition provides, in pertinent part:

> Labor is performed on a seasonal basis, where, ordinarily, the employment pertains to or is of the kind exclusively performed at certain seasons or periods of the year and which, from its nature, may not be continuous or carried on throughout the year. A worker who moves from one seasonal activity to another, while employed in agriculture or per-forming agricultural labor, is employed on a seasonal basis even though he may continue to be employed during a major portion of the year.
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> A worker is employed on "other temporary basis" where he is employed for a limited time only or his performance is contemplated for a particular piece of work, usually of short duration. Generally, employment, which is contemplated to continue in-definitely, is not temporary.

20 C.F.R. §655.100(c)(2)(ii). The temporary agricultural labor certification regulations add the qualification that the MSPA definition of "temporary" "refers to any job opportunity covered by this subpart where the employer needs a worker for a position, either temporary or permanent, for a limited period of time, which shall be for less than one year, unless the original temporary alien agricultural labor certification is extended based on unforeseen circumstances, pursuant to §655.106(c)(3) of this part." 20 C.F.R. §655.100(c)(2)(iii).

In the instant matter, the RA concluded based on a consideration of all three of Employer's applications and modifications, and the work schedule documentation, that the work appeared to be permanent in nature. I find convincing, however, Mr. Suzuki's argument in the request for review that his need is for temporary workers from March through December, and that his listing of dates that overlapped January through March in some of the applications was the result of his concentrating on the need for temporary workers rather than the season of actual need. I also conclude that the RA drew the wrong conclusion from the work schedule documentation submitted by Employer: it shows the different nature of farm operations in the

winter months (solely greenhouse and maintenance as opposed to field work), not that the work to be performed by the temporary laborers would be ongoing.

Although a RA may reasonably take into consideration other applications or modifications by the same employer for the same position, there is not sufficient evidence in this case to show that the position is actually permanent. Rather, the record evidences an employer struggling to produce an application that will pass muster under strict regulatory requirements. The record, viewed as a whole, indicates that Employer's positions are seasonal in nature. The application, as modified, only requests temporary work through mid-December. Should Employer later attempt to obtain temporary labor certification for positions lasting from January through March, the RA may reasonably question whether the need is temporary or seasonal. But that is not the situation in the pending application.

Positive Recruitment; Availability of Employer for Referrals

Pursuant to section 655.102(d), an employer seeking temporary labor certification for agricultural workers must submit in writing, as a part of its application, its "plan for conducting independent, positive recruitment of U.S. workers as required by §§ 655.103 and 655.105(a) of this part. . . . The plan shall describe how the employer will engage in positive recruitment of U.S. workers to an extent (with respect to both effort and location(s)) no less than that of non-H-2A agricultural employers of comparable or smaller size in the area of employment...." Section 655.103 details assurances that must be made by the employer in recruitment of U.S. workers, while section 655.105 details the procedure for recruitment after acceptance of the application by the RA. "positive recruitment" as meaning The regulations define

> ...the active participation of an employer or its authorized hiring agent in locating and interviewing applicants in other potential labor supply areas and in the area where the employer's establishment is located in an effort to fill specific job openings with U.S. workers.

20 C.F.R. §655.100(b). Section 655.103(d) requires that an employer "cooperate with the [Employment Service] System in the active recruitment of U.S. workers."

In the instant matter, the RA found that Employer had failed to provide adequate referral procedures because Employer's modification of the application indicated that Mr. Suzuki was available for referrals only after 4:00 p.m. The RA found support for this conclusion in the record by notations concerning the local job service's alleged difficulty in contacting Mr. Suzuki in the past.

An impression easily gained from this record is that there has been too little communication between Employer and the local job service. On the one hand, Employer, whose burden it is to establish the need for temporary alien employment and to engage in positive recruitment, has not made a heroic effort in meeting that burden. But his efforts must be evaluated in light of his business. In this instance he is a farmer whose work relates to growing plants from seeds, harvesting the fruits of the plants planted and cultivated, and marketing of his

products, as opposed to a line of work that deals largely in paper exchange, conference, contracting and negotiations.

Mr. Suzuki indicated that he would be available for referral after 4:00 p.m., a full hour during "normal business hours". I do not assume that a job service cannot make referrals during that hour as it would at any other time of the day. Further, the regulations make it clear that positive recruitment is related to the recruitment activities of comparable businesses in the locality. I will not assume, as has the RA, that it is abnormal for a self-managed farm owner to conduct recruitment in the late afternoon or early evening, or not to have an employee in an office setting available at all times to receive applicants for temporary .or part-time work. Nor do I find it hard to imagine that a person seeking such work would not arrange to appear after 4:00 p.m. for an interview.

The record indicates that the local job service had difficulty contacting Mr. Suzuki in the past. However, the only documented statement of such difficulty is single attempt to visit Employer's farm and worker residences (AF 11-12). That the job service workers were unsuccessful in locating Mr. Suzuki is unremarkable as this visit appears to have been unscheduled.

Although I find legally insufficient the HA's conclusion that Employer's referral arrangements made the application unacceptable for consideration, I note that better communication between the job service and Employer is needed to promote Employer's obligation to engage in positive recruitment. I also note that Employer's installation of an answering machine on his telephone is a step in that direction.

ORDER

The Regional Administrator is hereby ORDERED to accept Employer's application as having met the requirements of §§655.101-655.103, and shall continue processing the application consistent with 20 C.F.R. Part 655.

Employer shall fully comply with the positive recruitment requirement as set forth in 20 C.F.R. Part 655.

At Washington, D.C. Entered: 8/9/91

by:
JAMES GUILL
Associate Chief Judge

JG/trs