SEP 23 1992

In the Matter of:

JESUS RODRIGUEZ
Complainant, Case No. 92-TAE-8

v.

ARTHUR GNESA d/b/a GNESA FARMS,
Respondent,

and

STATE OF IDAHO DEPARTMENT OF
Employment,

Party-in-Interest

Decision And Order

1. This case arises under the Immigration and Nationality Act, 8 U.S.C. § 1188 et seq. and its regulations at 20 C.F.R. § 655 et seq., - and the Wagner-Peyser Act of 1933, as amended, 29 U.S.C. § 41 et seq. - and its implementing regulations at 20 C.F.R. § 658 et seq. - The complainant and the Department Labor filed proposed findings of Fact and Conclusions of law.

Findings of Fact

2. On May 1, 1991, Jesus Rodriguez filed a complaint with the Idaho Department of Employment pursuant to 20 C.F.R. § 658.411. Administrative Record (AR) at 276-79. The complain alleged that Mr. Gnesa, d/b/a Gnesa Farms, violated 20 C.F.R. § 655.103 (e) by giving the H-2A workers preferential treatment for work and housing over an able and qualified U.S. Worker for the position of an irrigator. Id. The complaint further alleged a loss of wages because of Gnesa's violations of 20 C.F.R. § 655.103(c) and (e). Id.

3. On June 4, 1991, after investigating the complaint and considering the evidence submitted by the parties, the Idaho Department of Employment (IDE) issued its decision. AR at 112-120. IDE found that the evidence supports the complainant's allegations as listed below:

1. that the Complainant was referred to Snake River Farmer's Association (SRFA) on April 18, 1991.

2. that SFRA referred the Complainant to Arthur Gnesa, dba Gnesa Farms on April-18, 1991.

3. that Arthur Gnesa, employ the Complainant dba Gnesa Farms refused to stating that they had sufficient workers.

4. that the Respondent was told that in order to comply with 20 C.F.R. § 655.106(e)(l) he was required to hire the Complainant even if it meant sending the H-2A worker home.

5. that the Respondent refused to send the H-2A worker(s) home and provide employment to the Complainant, a U.S. worker.

6. that the Respondent stated that if the hired the Complainant, a U.S. worker he would divide the work among the remaining workers.

7. that dividing the work in this manner would also be in violation of the job order because it would result in less wages than the job order specifies.

8. that no housing was available as per the job order.

9. that the Respondent was certified for H-2A workers.

10. that, upon information and belief, one of the H-2A workers is not legally in this country as a worker but is here on a tourist visa.

AR at 113-14.

4. IDE determined that Mr. Gnesa's actions violated 20 C.F.R. §§ 655.103(c) and (e), and that the appropriate remedy for Mr. Gnesa was to:

(a) provide lost wages to the Complainant as Per the average hourly earnings times 8 hours Per day, times 6 days per week, times the number of days that Complainant was unemployed or the 3/4 guarantee whichever is greater.

(b) provide written assurance that all qualified U.S. workers will be accepted for employment in the future and that Respondent will not blacklist or otherwise retaliate against the Complainant as assured in 20 C.F.R. § 655.103(2).

(c) provide written assurance that specifications or future orders will accurately represent the terms and conditions of employment and that there will be full compliance with all job orders assurances.

(2) Failure of the Respondent to provide the remedies specified herein within 20 days from the date of the signature on the attached certified mail return will be sufficient cause

to initiate procedures as in 20 C.F.R. § 568.416(a)(4)[1] and 20 C.F.R. § 658.501(a)(3) and (a)(6) and to discontinue employment services, including those for the temporary employment of agricultural workers to the Respondent.

AR at 67-68, 114-15.

5. On June 7, 1991, Mr. Gnesa filed a notice of appeal under 20 C.F.R. § 658.417. AR at 122. After a formal hearing was held on November 6, 1991, the state hearing officer issued his decision dated January 15, 1992, affirming IDE's decision. AR at 56-60. He determined that "the Gnesa Farms was in violation of the assurances contained in its job order number 6022597 and therefore is ordered to provide to the complainant compensation he is entitled to in the amount of $1,614.95." AR at 60.

The state hearing officer calculated the amount of restitution as follows:

> The compensation is based upon the formula guaranteeing three-fourths of the work period within the growing season minus Sundays and federal holidays, times eight hours per day times the rate of pay of $5.60 per hour.
>
> The number of working days for the complainant was from April 22, 1991 through November 30, 1991, was 186. One hundred eighty-six (186) times three-fourths guarantee equals 139.5 working days times eight hours equals 1,116 times $5.60 per hour equals $6,249.60 This figure minus the earnings of $4,634.65 which the complainant received from other sources during this period equals $1,614.95.

AR at 53.

6. On January 28, 1992, Mr. Gnesa requested a review of the state hearing officer's decision with the Regional Administrator. AR at 47.

7. The Regional Administrator issued his decision on June 17, 1992, affirming the state hearing officer's determination that Mr. Gnesa violated 20 C.F.R. § 655.103(e). AR at 15-19. The Regional Administrator stating that

> [t]his determination is based on the failure of the employer, Gnesa Farms, to offer employment to a qualified, able, willing, and available U.S. worker after April 30, 1991, while continuing to employ temporary foreign workers.

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[1] The correct cite here is 20 C.F.R. § 658.416(d)(4) and it states:

> If the complaint is against an employer, and the State office has found that the employer has violated JS regulations, the determination shall state that the State will initiate procedures for discontinuation of services to the employer in accordance with Subpart F.

> In submitting an H-2A application, the employer makes an assurance to the Department of Labor that no U.S. worker will be rejected for employment for other than a lawful job-related reason, and that employment will be provided to any qualified, eligible U.S. worker who applies to the employer until 50 per cent of the period of the work contract, under which the foreign worker who is on the job was hired, has elapsed. (See 20 C.F.R. § 653.103 and particularly paragraphs (c) and (e) .)
>
> Mr. Gnesa argues, in his letter to this office requesting this Regional Office review, that he hired Mr. Rodriguez and that Mr. Rodriguez subsequently left with the understanding that he could make more elsewhere. The record show that Mr. Rodriguez was employed by Gnesa Farms and paid for working several days, the last day being April 30, 1991. The record also shows that he was not provided housing during this period, as required, and that regulations were violated during the initial referral process as well. These violations were investigated by the Wage and Hour Division and that file was closed after Gnesa Farms agreed to reimburse the complainant for wages due for failing to hire him when first referred and paying travel costs for failing to provide housing.
>
> This determination relates to the subsequent failure to hire Mr. Rodriguez.

AR at 16-17.

8. The Regional Administrator further found that

> Mr. Rodriguez left Gnesa Farms at the end of April. He left because the employer failed to provide housing requested by Mr. Rodriguez and agreed to by Gnesa Farms in the H-2A application and because the employer continued to indicate that the work would be less than full-time. The reasons for leaving were considered justifiable; and, after he left, Mr. Rodriguez was again considered to be a qualified U.S. worker who was available for irrigator employment.
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> He was, therefore, referred again to the Snake River Farmers Association for referral to an employer and the association again advised the agency to refer the worker to Gnesa Farms as the only employer in the association who could accept a worker. Failure to make a good faith job offer at that time constituted the regulatory violation that resulted in the determination by the State agency and is the basis for this determination.

AR at 18.

9. The Regional Administrator modified, however, the hearing officer's determination and reduced the amount of restitution awarded to the complainant from $1,614.95 to $898.90. AR at 18.

> The amount of restitution is calculated by multiplying 178 days of the contract period times 3/4 which is the number of days work must be offered, times 8 hours which are the number of hours offered in the job order per day, times $4.97 which is the average wage during the time Mr. Rodriguez actually was employed. This amounts to $5,307.96. Deducting actual earnings during the season of $4,409.06 leaves $898.90 as the amount due Mr. Rodriguez.
>
> This amount is considered appropriate restitution to correct this violation and revised from the amount determined by the State hearing official. In calculating the number of days in the contract period, a deduction must be made for Federal holidays. The number of days for the remainder of the contract period, from May 1 through November 30, 1991, less Sundays and Federal holidays amounts to 178 days, rather than the 186 days used in the agency calculation.
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> The hearing official also uses the estimated hourly earnings figure shown in the H-2A application for the hourly rate in establishing the amount to be awarded Mr. Rodriguez. Regulations require that this estimate be shown on the job order, but it is not a guarantee. Its purpose is to provide the applicant with an hourly amount which can be used for estimating earnings on an order which pays on a piece rate basis. When the three-fourths guarantees is actually imposed, the worker's average hourly earnings or the adverse effect wage rate, whichever is higher, is used for establishing the hourly rate. In this instance, Mr. Rodriguez had worked for Gnesa Farms and established an hourly earnings rate determined by the Wage and Hour Division of $4.97 per hour. Since this is higher than the adverse effects wage rate, it is this figure which should be used.

AR at 18.

II.

CONCLUSIONS OF LAW

1. This case arises under the Immigration and Nationality Act, 8 U.S.C. § 1188 et seq. and its regulations at 20 C.F.R. § 655 et seq., and the Wagner-Peyser Act of 1933, as amended, 29 U.S.C. § 41 et seq. and its implementing regulations at 20 C.F.R. § 658 et seq.

2. 20 C.F.R. § 655.103 details must include in its job offers before the assurances an employer the Regional Administrator will accept his temporary alien agricultural labor certification application for review. Section 655.103(e) provides:

> (e) Fifty-Percent rule. From the time the foreign workers depart for the employer's place of employment, the employer, except as provided for by §655.106(e)(l) of this part, shall provide employment to any qualified, eligible U.S. worker who applies to the employer until 50% of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the

> employer shall offer to provide housing and other benefits, wages, and working conditions required by § 655.102 of this part to any such U.S. worker and shall not treat less favorably than H-2A workers any U.S. worker referred or transferred pursuant to this assurance.

3. In addition to the requirements of providing housing[2] and transportation, wages and suitable working conditions, section 655.102 also mandates that the employer guarantee an offer to each worker employment for at least three-fourths of the number of hours in the work days for the period for which certification is sought. If the employer fails in this offer, then it is required to pay the worker the amount the worker would have earned if he worked the guaranteed number of days.

> (6) Three-fourths guarantee--(i) Offer to worker. The employer shall guarantee to offer the worker employment for at least three-fourths of the workdays of the total periods during which the work contract and all extensions thereof are in effect, beginning with the first workday after the employment and ending on the expiration date specified in the work contract or in its extensions, if any. If the employer affords the U.S. or H-2A worker during the period less employment than that required under this paragraph (b)(6), the employer shall pay such worker the amount which the worker would have earned had the worker, in fact, worked for the guaranteed number of days. . . .

20 C.F.R. § 655.102(b)(6).

4. The Regional Administrator correctly found that Mr. Gnesa preferred the H-2A workers over Mr. Rodriguez, thus violating 20 C.F.R. § 655.103(e). At the state hearing, Mr. Gnesa testified that his agent, SRFA, signed all the temporary labor certification forms and that he did make all the assurances[3] listed in 20 C.F.R. § 655.103. AR at 189-90, 199- 203. Mr. Gnesa

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[2] The employer shall provide to those workers who are not reasonably able to return to their residence within the same day housing, without charge to the worker, which may be, at the employer's option, rental or public accommodation type housing.

20 C.F.R. § 655.102(b)(l).

[3] EXAMINER: I think what she's asking, Mr. Gnesa, were you aware that you had to guarantee everything that's in this document [The Temporary Labor Certification Form, AR at 73-99]? That's the assurance that your agent signed. You'd agreed to it, it was your responsibility to provide all of these things.

A: Yeah. And I really believe I have, except they just kept shipping too many men to me. We've had tough years.

(continued...)

further testified that he only had enough work for one and half workers. AR at 178. He then testified that he was advised by SRFA that he must share work among the H-2A and U.S. workers. AR at 181. He also admitted that he never discharged the H-2A worker in order to hire a U.S. worker. AR at 197.

Mr. Gnesa admitted that he could not offer Mr. Rodriguez the guaranteed number of hours listed on the job order, because he had divide the available work among three workers. By refusing to release the H-2A worker, he made it impossible for Mr. Rodriguez to receive his three-fourths guarantee. Mr. Gnesa clearly showed preference for the foreign worker over the U.S. worker in violation of 20 C.F.R. § 655.103(e).

5. The Regional Administrator's determination that Mr. Gnesa showed a preference for H-2A workers is further supported by Mr. Gnesa's failure to provide Mr. Rodriguez housing as required by section 655.102(b)(l).

Mr. Gnesa argued that when he asked Mr. Rodriguez to return to work at Gnesa's Farms, Mr. Rodriguez refused. Given the circumstances that led to Mr. Rodriguez's initial resignation that action was perfectly reasonable. Mr. Gnesa's refusal to displace the H-2A worker and to house the U.S. worker clearly demonstrates that no bona fide job opportunity existed for U.S. workers. He clearly showed preference for H-2A workers in violation of the Act and the regulations.

Mr. Gnesa when he filed an Temporary Labor Certification Application, made assurances that he would hire a qualified and willing U.S. worker if one became available. When an employer rejects the worker at the outset or terminates the worker for other that lawful job-related reasons, he must pay the worker the amount the worker would have earned if he had worked for the number of days guaranteed. 20 C.F.R. § 655.102(b)(6). Such a requirement is necessary to ensure that neither U.S. workers nor H-2A workers are adversely affected by the employer's failure to hire qualified workers or attempt to change the worker's terms and conditions of employment arbitrarily.

6. Mr. Gnesa showed preference for the H-2A workers over the U.S. worker, in violation of 20 C.F.R. § 655.103(e), therefore, Mr. Gnesa is required to pay the U.S. worker three-fourths of what he would have earned if he had been hired.

7. Section 655.102(b)(6)(i) provides that

> . . . [t]he work shall be offered for at least three-fourths of the workdays (that is, 3/4 x (number of days) x (specified hours)). Therefore, if, for example, the contract contains 20 eight-hour workdays, the worker shall be offered employment for 120 hours during the 20 workdays. A worker may be offered more than the specified hours of work on a single workday. For purposes of

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[3](...continued)
AR at 203.

meeting the guarantee, however, the worker shall not be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays.

8. To determine the wage rate which the worker should be paid, section 655.102(b)(6)(ii) provides,

> Guarantee for piece-rate-paid worker. If the worker will be paid on a piece rate basis, the employer shall use the worker's average hourly piece rate earnings or the AEWR, whichever is higher, to calculate the amount due under the guarantee.

The purpose of section 655.102(b)(6)(i) and (ii) is to ensure that the worker will be compensated for a guaranteed number of hours at a guaranteed rate when they are either unlawfully terminated or rejected by the employer.

9. Section 655.102(b)(6)(ii) requires that the Regional Administrator look at both the worker's average hourly piece rate earnings and the AEWR and determine which rate is higher. Since the complainant worked for Mr. Gnesa, the Wage and Hour Division has determined that $4.97 was the complainant's hourly earning rate[4] for the period he worker's average hourly was employed. In this case, since the piece rate earnings was higher than the

10. Regional Administrator determined that by multiplying the complainant's hourly piece rate by the number of days (three-fourths of the total number of days specified in the contract) and by the number of hours in a workday (in this case eight) would result in restitution in the amount of $5,307.96. Mr. Rodriguez received compensation in the amount of $3,993.00 for employment during the period from May 1, 1991 to November 30, 1991. The restitution owed the complainant by Mr. Gnesa is $898.90.

11. The burden of proof in a temporary alien agricultural labor certification is on the party requesting the hearing, once the Regional Administrator makes a prima facie case. H e determined that Mr. Gnesa violated 20 C.F.R. § 655.103(e) and that Mr. Gnesa owed Jesus Rodriguez restitution in the amount of $898.90.

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[4] In the non-Job Service complaint, the Wage and Hour Division of the Department of Labor calculated that Mr. Rodriguez' hourly wage was $4.97. AR at 33-37; see n. 7.

ORDER

It is ordered that Mr. Gnesa, d/b/a Gnesa Farms, pay Mr., Jesus Rodriguez the sum of $898.90.

GLENN ROBERT LAWRENCE
Administrative Law Judge