U.S. Department of Labor Office of Administrative Law Judges
Washington, DC

In the Matter of

ROY JOHNSTON, Case No. 85-TLC-9
Employer

Before: AARON SILVERMAN
Administrative Law Judge

DECISION AND ORDER

This is an administrative-judicial review of a denial of an application for labor certification for temporary employment of six aliens in the United States arising under the Immigration and Nationality Act (Act).[1]

Under Section 212(a)(14) of the Act an alien seeking to enter the United States to perform skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has certified to the Secretary of State and the Attorney General that (1) there are insufficient United States workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.[2]

Regulations promulgated by the Secretary of Labor relating to the processing of temporary labor certification applications are set forth at 20 C.F.R. §655 et seq. An employer who intends to employ an alien temporarily must submit, as part of his application, documentation which clearly meets the requirements of §655.203. Full compliance with those requirements is the minimum necessary to show that an employer has by reasonable means made a good faith effort to test the availability of, and recruit qualified U.S. workers who are willing to work at the prevailing wages and working conditions of the job opportunity.

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[1] 8 U.S.C. §1101 et seq.

[2] 8 U.S.C. §1182 (a)(14).

STATEMENT OF THE CASE

The Employer applied to certify six aliens as temporary agricultural workers to harvest grain and oilseed crops from September 15 to December 15, 1985. Job duties include the operation of harvesting combines including adjustment and maintenance as necessary, and driving equipment transporter trucks. Job requirement include basic reading and math skills, a driver's license, and three to six months' experience working with combine machinery.

The application was signed b y the Employer on August 29, 1985 and reached the Regional Administrator on September 10, 1985. It was denied by the Administrator on September 11, 1985 because it was untimely under 20 CFR §655.20l(c).

DISCUSSION

Section 655.201(c) is clear in its requirement that an application for temporary certification be filed in sufficient time for the state agency to attempt to recruit U.S. workers locally and nationally for 60 days. The regulation suggests that an application be filed 80 days before the estimated date of need for the labor in order to allow time to complete the process of bringing foreign workers into the United States.

In this instance, the Regional Administrator received the application five days before the estimated date of need , and denied the application on the basis of insufficient time to recruit U.S. workers.

On appeal, the Employer notes that in previous years he has been granted temporary certifications and extensions, and was granted certification for wheat harvesting workers earlier this year. He also states that he "accepted [his] sunflower papers to be processed 80 days previous to the sunflower harvest but this never got done."

The Employer has submitted no evidence to document that he filed an application at the proper time. It is unclear who the Employer believes is at fault when he says the processing "never got done." It is clear that the Employer understands the certification process and the time sequences involved. The burden is on the Employer to ensure that his application is complete and in compliance. If the Employer chose to wait: two months before checking on the status of his request for workers, he cannot now request relief because it is time to harvest. The Employer best understands his own needs; the fact that he did not even "reapply" until two and one-half weeks before his date of need indicates a lack of diligence which cannot serve as a basis for special consideration under the Act.

Finally, the Employer's application indicates that he advertised for workers in Austin, Texas and Pierre, South Dakota in the spring. These efforts cannot be considered a fair test of the U.S. labor market six months later. The Employer also notes that he is currently advertising in Minot, North Dakota. Under such circumstances, labor certification cannot be granted when the U.S. labor market has not sufficiently been tested.

ORDER

The denial of labor certification is AFFIRMED.

AARON SILVERMAN
Administrative Law Judge

Dated: SEPT 26 1985
Washington, D.C.

AS/klp