

**U.S. Department of Labor**

Office of Administrative Law Judges  
Heritage Plaza Bldg. - Suite 530  
111 Veterans Memorial Blvd  
Metairie, LA 70005



(504) 589-6201  
(504) 589-6268 (FAX)

**Issue Date: 21 April 2004**

**CASE NO.: 2004-TLC-6**

**In the Matter of:**

**SUNNY VIEW FARMS,  
Employer**

**BEFORE: JUDGE RICHARD D. MILLS  
Administrative Law Judge**

**FINAL DECISION AND ORDER**

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (hereinafter referred to as “the Act”), and its implementing regulations, found at 20 C.F.R. Part 655. An administrative review was conducted, pursuant to 20 C.F.R. § 655. 112(a), in response to the appeal by Employer, Sunny View Farms (“Sunny View”), of the decision by a U.S. Department of Labor Certifying Officer denying Sunny View’s application for temporary alien agricultural labor.

**PROCEDURAL HISTORY**

On February 4, 2004, the U.S. Department of Labor, Employment and Training Administration (“ETA”) accepted for consideration an application from Sunny View requesting H-2A temporary alien labor certification for two job opportunities. On March 31, 2004, an ETA Certifying Officer denied certification for the two job opportunities, finding that Sunny View had not complied with the workers’ compensation requirements specified at 20 C.F.R. § 655.102(b)(2). Sunny View subsequently requested an expedited administrative review of the matter. Sunny View’s request for review was received on April 9, 2004, and the ETA case file was received on April 14, 2004. A conference call between the parties was held on April 15, 2004. Participating in this conference call were Elaine Flaming, an agent of Agri Placements International, Inc. who was speaking on behalf of Sunny View, Bruce Ellertson, an insurance agent for Nodak Mutual Insurance Company (“Nodak”), and Peter Nesson, Esq., representing the U.S. Department of Labor.

After the conference call, written submissions were received by Mr. Nesson, on behalf of the Department of Labor, and by Ms. Flaming, on behalf of Sunny View. This Decision and Order is based on the written record with due consideration to the written submissions provided by the parties.

### **STATEMENT OF THE CASE**

In its Application for Alien Employment Certification to the Department of Labor, Sunny View requested certification for two farm labor positions in North Dakota. Sunny View indicated that the positions entailed 48-hour work weeks at \$8.53 per hour. For compliance with the workers' compensation insurance requirements of the Act and implementing regulations, Sunny View obtained an insurance policy from Nodak covering benefits for, among other things, "work loss" suffered by the alien workers, defined as "eighty-five percent of loss of income from work, a farm employee who would normally be employed in gainful activity during the period of his disability, would have performed had he not been injured, reduced by any income from substitute work actually performed by the farm employee or by income the farm employee would have earned in available appropriate substitute work which he was capable of performing but unreasonably failed to undertake...." These work loss benefits were limited for an injury sustained by any one farm employee in any one accident to \$150.00 per week and \$15,000.00 in the aggregate.

### **DISCUSSION**

North Dakota law does not require workers' compensation insurance for employees engaged in agricultural service. See NDCC 65-01-02 (16) and (21). As pointed out by the Department of Labor, the Act and implementing regulations require, for cases involving employment that is not covered by State workers' compensation law, that the employer provide workers' compensation insurance consisting of benefits at least equal to the State workers' compensation requirements for comparable employment. See 8 U.S.C. § 1188(b)(3); 20 C.F.R. §§ 655.90(b)(2)(3) and 655.102(b)(2). Specifically, 20 C.F.R. § 655.90(b)(2)(3) states that the Department of Labor may not issue a certification if:

The employer has not provided the Secretary with satisfactory assurances that if the employment for which the certification is sought is not covered by State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to those provided under the State workers' compensation law for comparable employment.

In this case, the Act and implementing regulations require that Sunny View provide workers' compensation insurance for the alien agricultural positions in question, with benefits at least equal to the benefits provided under North Dakota law for employment that is comparable to Sunny View's alien agricultural positions. Given this requirement, the ETA Certifying Officer compared the terms of the insurance obtained by Sunny View to the minimum workers' compensation requirements under North Dakota law. Among other provisions, North Dakota's minimum workers' compensation requirements direct that employees who have suffered a total disability be paid a weekly benefit equal to sixty-six and two-thirds percent of the gross weekly wage of the employee. See NDCC 65-05-09.

The alien agricultural positions sought by Sunny View entail 48-hour work weeks at \$8.53 per hour. Therefore, the weekly wage for these employees would be \$409.44. The minimum requirements under North Dakota workers' compensation law would require that these workers, in cases of total disability, be paid a weekly benefit of \$272.96. The insurance obtained by Sunny View, however, limits work loss benefits to a maximum of \$150.00 per week. The \$150.00 per week limitation would cover only about 26 hours of employment at \$8.53 per hour. Therefore, the insurance obtained by Sunny View does not provide benefits at least equal to the minimum benefits required under North Dakota workers' compensation law. As Sunny View has not complied with the workers' compensation insurance requirements under the Act and implementing regulations, Sunny View's application for temporary alien agricultural labor certification cannot be granted.

Accordingly, the Certifying Official's denial of Sunny View Farms' Application for Alien Employment Certification is **AFFIRMED**.

**So ORDERED.**

**A**

**RICHARD D. MILLS**  
Administrative Law Judge