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INSIDE

IN FUTURE ISSUES

FmHA "borrowers" whose debts were discharged in Chapter 7 found ineligible for primary loan servicing

The Agricultural Credit Act of 1987 established new FmHA farm loan servicing programs, among which was the primary loan servicing program. 7 U.S.C.A. section 1991 (b)(3)(West 1988). That program authorized one or a combination of forms of loan servicing, including consolidation, rescheduling, reamortization, interest rate reduction, and loan restructuring.

The primary loan servicing program explicitly directed the Secretary of Agriculture to first "modify delinquent farmer program loans . . . to the maximum extent possible . . . to avoid losses to the Secretary on such loans . . ." (7 U.S.C.A. section 2001(a)(1)) and second to modify those loans, to the maximum extent possible, "to ensure that borrowers are able to continue farming or ranching" (7 U.S.C.A. section 2001(a)(2)).

Of the two directives, the first, avoiding losses on those loans, was implicitly made the primary goal as a result of the requirement that a restructured loan must result in a "net recovery to the Federal Government . . . that would be more than or equal to the net recovery to the Federal Government from an involuntary liquidation or foreclosure on the property securing the loan." 7 U.S.C.A. section 2001(b)(4). In other words, the Secretary was to administer the primary loan servicing program in a cost effective manner for the federal government.

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Farm programs, bankruptcy, and Article 9

Substantial litigation has been generated over the past several years regarding the plethora of farm programs and farm benefits available to agricultural businesses. Unfortunately, the case law to date has been inconsistent. However, until recently, the conventional wisdom had always been that deficiency payments would be classified as proceeds of a planted crop. *See, e.g., In re Nivens*, 22 Bankr. 287 (Bankr. N.D. Tex. 1982).

The Eighth Circuit Court of Appeals has recently held, in *In re Kingsley*, 865 F.2d 975 (1989), that such deficiency payments are not "proceeds" of crops under U.C.C. section 9-306. In reaching this decision, the court of appeals carefully examined the specific features of the farm program establishing the deficiency payments. It noted that, under this program, producers of wheat and feed grains were compensated under a formula using a deficiency payment rate. This rate is the amount by which the target price for the crop exceeds the higher of the national weighted average market price received by farmers for the crop during the first five months of the marketing year, or the national average loan rate for the crop before reduction to maintain the crop's competitive market position. As a result, according to the court, such payments are not received by producers for the sale, exchange, or other disposition of crops, but result solely from the producer's contracts with the Commodity Credit Corporation. As a result, a security agreement which covered "all crops of every type and description grown and/or harvested" by the debtors and "all proceeds and products" of such crops was held to not cover the debtor's deficiency payments.

The *Kingsley* court was also required to analyze the nature of diversion payments that are made to producers of wheat and feed grains who "devote to approved conservation uses an acreage of cropland on the farm in accordance with land diversion contracts." According to the court, such diversion payments are designed to compensate producers for converting cropland to conservation uses as part of a general program for regulating the total national acreage of the crops they produced. The court analogized the land diversion program to the 1983 PIK program. The

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In implementing the primary loan servicing program, the Secretary issued regulations that made borrowers whose debt to the FmHA had been discharged in a Chapter 7 bankruptcy ineligible to receive notice of, or to apply for, primary loan servicing if that discharge had occurred prior to January 6, 1988, and the borrower had not reaffirmed the FmHA debt. 7 C.F.R. section 1951.907(d). That regulation implicitly reflected the position of the Secretary that, in such situations, there was no debt to restructure.

Among those affected by the regulation were borrowers whose debt to the FmHA had been discharged, but whose property remained subject to a security interest in favor of the FmHA. The consequences of that situation in light of the directives on which the primary loan servicing program was premised were twofold.

First, from the borrower's perspective, borrowers were unable to seek or obtain the benefits of the primary loan servicing program as a means of ultimately securing the release of the FmHA's lien on their property. Second, from the federal government's perspective, the Secretary was precluded from evaluating whether the primary loan servicing program offered the most cost effective means of realizing the value of the secured property in a manner consistent with ensuring that the borrower continued farming or ranching.

The Lees were among the borrowers whose debt to the FmHA had been discharged in a Chapter 7 proceeding, but who had property still encumbered by a lien in favor of the FmHA. Precluded by the regulation from using primary loan servicing to release the lien in a manner that both allowed the FmHA to recover the secured property's value and the Lees to keep farming with it, the Lees challenged the regulation.

Because primary loan servicing was to be available only to "borrowers" within the defined meaning of that term in the legislation, the Lees' argument was premised on their falling within that definition. The Act defines "borrower" to mean "any farm borrower who has outstanding obligations to the Secretary under any farmer program loan, without regard to whether the loan has been accelerated, but does not include any farm borrower all of whose loans and accounts have been foreclosed on or liquidated, voluntarily or otherwise." 7 U.S.C.A. section 1991(b)(1).

The Lees maintained that the outstanding lien on their property in favor of the FmHA constituted an "outstanding obligation to the Secretary" as that phrase is used to define the term "borrower." In other words, as a result of the lien, their interest in the secured property was obligated to the Secretary.

However, in *Lee v. Yeutter*, Civ. No. 3-89-344 (D. Minn. Oct. 18, 1989) (J. Devitt) (1989 U.S. Dist. LEXIS 12508), the Lees' claims were unsuccessful. The court found that the regulation did not violate the 1987 Act.

The court in *Lee* expressed sympathy for the Lees' claims, observing that "[t]o give such borrowers another chance to refinance their farms would seem to be in keeping with the generally expressed intent of Congress to keep these borrowers on their farms." Slip op. at 5. However, also observing that liens surviving a Chapter 7 discharge impose no personal liability on the debtor and that Congress, in its definition of "borrower," did not address the precise situation presented by the Lees and others similarly situated, the Court concluded that what ultimately was to be observed was judicial deference to the administrative interpretation of the legislation.

With respect to the Secretary's interpretation of the definition of "borrower," the court reached two conclusions. First, the court concluded that the Secretary's position that borrowers such as the Lees have no debt to restructure was rational. Second, the court also found that it was not arbitrary for the Secretary to make the Lees and those similarly situated ineligible for primary loan servicing but eligible for the 1987 Act's preservation loan servicing programs of "lease-back" and "buy-back," notwithstanding the fact that the same prerequisite of being a "borrower" applies to both programs. See 7 C.F.R. section 1951.911 (a)(5)(1989); Slip op. at 7-8.

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FARM PROGRAMS, BANKRUPTCY, AND ARTICLE 9 / CONTINUED FROM PAGE 1

lender argued that such diversion payments were substitutes for the crops the farmers would otherwise have planted, citing *Osteroos v. Norwest Bank Minot*, 604 F. Supp. 848 (D.N.D. 1984). As a result, according to the lender, its security interest in crops and crop proceeds should be extended to cover the land diversion payments. This argument was rejected by the court, which observed that such payments result from a farmer's agreement not to plant certain crops. As a result, there "is simply no sense in which the [debtors] received the diversion payments 'upon the sale, exchange, collection or other disposition' of their crops." 865 F.2d 975, 979.

The Tenth Circuit has similarly ruled that proceeds of the PIK program are not proceeds of a non-existent crop. In so holding the court joined the Seventh Circuit and Eighth Circuit in holding that, for Article 9 purposes, such contract rights are either accounts or general intangibles. *In re Schmaling*, 783 F.2d 680 (7th Cir. 1986); *In re Sunberg*, 729 F.2d 561 (8th Cir. 1984).

It would appear that the prevailing view of government farm program benefits is as follows: agricultural entitlement payments that result from the actual disposition of a planted crop are proceeds of that crop; however, such payments based on any agreement not to plant crops or produce a commodity arise from accounts or general intangibles. Absent careful drafting, Chapter 7 trustees will continue to farm the farm programs more effectively than the farmers themselves.

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STATE ROUNDUP

FLORIDA. *Appellate court sets measure of damages for destruction of citrus stock.* In *Florida Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc.*, 541 So.2d 1243 (1989), the Florida Second District Court of Appeal reviewed a trial court judgment awarding damages to citrus nursery owners who had suffered personal property losses from a destruction and quarantine program conducted by the Florida Department of Agriculture and Consumer Services ("Department"). The final judgment below had awarded the owners damages for the loss of existing stock and for subsequent lost or retarded production of new stock under a citrus canker eradication program.

The appellate court affirmed the jury award compensating the owners for losses of existing stock. It reversed, however, the award of damages for subsequent lost production and remanded that issue to the trial court with instructions to ascertain if any damages were recoverable under the temporary takings standards of *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). *Id.* The appellate court also certified two questions to the Florida Supreme Court as being of great puhlic interest. *Id.*

On appeal of the trial court decision, the Department raised three issues. First, it alleged that the trial court erroneously allowed the jury to consider evidence of damages based on market prices after the date of alleged taking. Second, it alleged that damages were miscalculated, even if post-takings prices were properly considered. Finally, it argued that damages for lost future production were not constitutionally awardable in an inverse condemnation action.

The Department issued an emergency order from September 1984 through April 1, 1985, under which one could not sell citrus nursery stock in the state. The Department executed certain "immediate final orders" under which healthy citrus stock, including that of the plaintiff's, was burned. The Department, together the the U.S.D.A., decontaminated various greenhouses after the citrus stock was burned. This caused the plaintiffs to shut down their nurseries for a period of two to four months.

The appellate court stated that the trial court did not consider whether or not the decontamination process constituted a taking. This omission was based on the plaintiffs' failure to amend their complaint to seek damages for lost production until after the bench trial on liability.

Mid Florida's expert economist created a hypothetical April, 1985, market for nursery stock. He then deducted various presumed cost items in determining a "net value cost" as full compensation for the taking. The jury used this method in assessing damages.

The Department alleged that damages, however, for lost production were not legally awardahle.

The appellate court stated that future increases in value generally are not considered in determining eminent domain compensation. Rather, the damages are determined as of either the date of trial or the date upon which title passes.

The court cited various opinions of the Florida Fifth District Court of Appeal that determined compensation as of the date of picking.

The *Mid-Florida* court decided that this was an "exceptional situation" because no citrus market existed for the nursery owners' market in october, 1984. Therefore, the jury had to consider evidence of earlier or later market prices.

Determination of an inverse condemnation award, based on future market prices, constitutes a matter generally left to the jury in a condemnation hearing. Evidence showed that the "future" market was "in the past" at the time of the jury's deliberations and therefore the jury did not have to speculate as to damages.

The court further held that the jury could more properly assess damages based on the time of expected sale than by extrapoloating an October price from that future market. The court considered several measures of damges and held that the record supported the jury's findings that the owners had properly deducted labor and other expenses that would have been incurred but for the taking.

The appellate court reversed the jury's award of lost or retarded production of new stock by interrupted production caused by the quarantine. The court held that the evidence did not support that finding based on either consequential business damages or on the constitutional temporary taking theory.

The court stated that consequential business damages are based in statutory, not constitutional law. No Florida statute conferred the right to such damages to the grove owners.

The court discounted the owners' argument that the consequential damages would be available because, by analogy, they would be awardable in a tort action. First, the owners had not pled a tort claim. Second, the grove owners had not established operational, as versus planning level errors, by the State that would have avoided sovereign immunity.

Finally, the court held that the owners failed to plead, and had therefore not established, a compensible, temporary taking under *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S.Ct. 233378 (1987).

The court remanded to the trial court with instructions to enter a partial final judgment awarding compensation for the loss of stock plus prejudgment interest from the effective date of the spring market, or April 1, 1985. It reversed the award of compensation for lost or retarded production of new stock, but authorized the owners to amend their complaint to plead a *First English* temporary taking.

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ADDITIONAL STATE ROUNDUP
MAY BE FOUND
ON PAGE 7

Immigration potpourri: H2-As and sanctions

by Roxana C. Bacon

[Editor's note:
The following article is a continuation of the discussion begun in the November issue of the Update.]

H-2A summary

The H-2A non-immigrant visa category was created through the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, and is codified as section 216 of the Act, 9 U.S.C. section 1186.

The amended statute declares that the H-2A designation applies to temporary entrants coming to the U.S. "to perform agricultural services or labor . . . of a temporary or seasonal nature." The statute also states that "agricultural labor or services" may be defined in regulations issued by the Secretary of Labor but will include the definitions of agriculture set forth in section 3121(g) of the Internal Revenue Code, 26 U.S.C. section 3121(g), and section 3(f) of the Fair Labor Standards Act, 29 U.S.C. section 203(f). The new statutory provisions envisage an enhanced role for the Departments of Labor and Agriculture in the administration of the H-2A provisions.

Definition of "employer"

Only an "employer" may file an application for H-2A temporary agricultural labor certification. An employer is a "person, a firm, a corporation or another association or organization which has an employee and which is located within the U.S. so that workers may be referred to it for employment, which will employ workers at a place within the U.S., and which will have an employer relationship with respect to the H-2A employees so that it is authorized to hire, pay, fire, supervise, or otherwise control the work of that employee." 20 C.F.R. section 655.100(b).

Since in agriculture, the use of employer associations is common, the regulations provide that an association of agricultural employers shall be considered a sole employer if the association has the "indicia of an employer" as set forth in the Department of Labor (DOL) definition. If the association "shares with the employer member" one or more of the definitional indicia, it is not considered a sole employer but a joint employer with the employer member with which it shares characteristics. Whether an association is considered to be a joint employer or sole employer is important for purposes of assessing penalties for failure to comply with the H-2A regulations.

If a joint employer association makes the application, and a member of the association is later determined to have committed a substantial violation of the regulations, that violating member may be denied the opportunity to apply for H-2A certification, but the other members will not be tarred with the same brush, absent proof that the other members knowingly participated in the violation. 20 C.F.R. section 655.110(c)(2).

However, if an association has filed for certification as a sole employer, and if the association is later determined to have committed a substantial violation, none of the individual producer members of the association shall be permitted to employ H-2A workers as a part of that association again. 20 C.F.R. section 655.110(f).

Definition of covered agriculture

By statute, the definition of "agricultural labor or services" so as to qualify for H-2A consideration is defined as having to include "agricultural labor" as recorded in I.R.C. section 3121(g), and as defined in section 3(f) of the Fair Labor Standards Act, 7 U.S.C. section 92(c). The IRC definition is extremely broad.

> As used in this subsection, the term 'farm' includes stock, dairy, poultry, fruit, furbearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

The Fair Labor Standards Act definition of agriculture is also broad:

> "agriculture" includes: (f) . . . farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities as defined as agricultural commodities in Section 1141j(g) of Title 12), the raising of livestock, bees, furbearing animals, or forestry or lumbering operations performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Definition of "temporary or seasonal nature"

The definition of temporary for H-2A workers is the same as that used by the Immigration and Nationality Act (INA) for H-2B workers, less than 12 months, although there is a provision under INS regulations which could allow extensions of H-2A stays for up to three years. In its preamble to the June 1, 1987 regulations, DOL incorporated the definition of temporary set forth in *Full Technical Service Corporation v. INS*, 722 F.2d 893 (1st Cir. 1983) and *North American Industries, Inc. v. Feldman, 648 F. Supp. 578 (S.D. N.Y. 1986).*

The job offer

The job offer is made on specific DOL forms. The most important aspect of the job offer to understand is that whatever benefits, wages, and working conditions the employer intends to offer or provide the H-2A workers must also be offered to and provided to the recruited U.S. workers, and conversely.

Adverse effect wage rate (AEWR)

Few agricultural employers pay their work force on a salary basis. Usually employees are compensated based upon an hourly wage or upon a piece rate. Recognizing that reality, the DOL has for many years required first H-2 and H-2A criteria employers to pay the higher of (a) the prevailing wage in the industry, (b) a statutory minimum wage, or (c) an adverse effect wage rate (AEWR) as determined by the Director of the U.S. Employment Service. Sheepherders are treated differently under DOL "special procedures," which allow a monthly salary and waive the 40-hour week. Except for sheepherders, in virtually all of the H-2 and H-2A applications submitted to date, the AEWR applies. The AEWR has been the subject of on-going litigation among employers, agricultural workers, and the DOL.

AEWRs have been a historical tradition in the employment of temporary workers going back as far as 1953. While modifying the procedures every few years, DOL continued to be in the AEWR-setting business without incident until the early 1980s when its methodology was attacked by a number of worker representative groups. The resulting litigation was not concluded by the time the passage of IRCA allowed DOL an opportunity to adopt an entirely new AEWR methodology, based on preventing *future* adverse wage effects

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rather than redressing past adverse wage effects.

The new methodology generated more litigation. *AFL-CIO v. Brock,* DDC Civ. Div. No. 87-1683 (Aug. 5, 1987), was brought by farmworker advocates who contended that DOL's H-2A methodology did not adequately protect U.S. farmworkers, and constituted a dramatic reversal of the AEWR methodology used for the old H-2 program. The district court agreed with the farmworkers, but the court of appeals reversed, stating that DOL had the authority to alter its past policy and adopt the interim H-2A methodology if it can provide a reasonable explanation for the change. The appeals court ruling placed the rationale for the AEWR H-2A methodology in the lap of DOL.

DOL developed and published a rationale, and the court then upheld the resulting AEWR methodology and rationale. *AFL-CIO v. Dole,* F.2d , No. 89-5001, 89-5012 (D.C. Cir. Aug. 29, 1989). Plaintiffs petition for rehearing was denied.

Employer guarantees

The employer must guarantee the worker employment for at least three-quarters of the workdays of the total contract period, including any extensions. The guarantee is computed by multiplying the number of hours in the workday as shown on the job offer by the number of workdays in the total contract period. Provision is made for abrogation of this guarantee due to an act of God.

Employee benefits

The only traditional benefit that the H-2A employer must provide is worker's compensation or its equivalent, if the employer is in a state which does not require worker's compensation. The employee is not responsible for federal or state taxes, and the employer need not deduct or withhold income tax for any H-2A employees. Employers should note that the House Ways and Means Committee's 1990 tax package includes a provision requiring withholding income taxes from certain agricultural workers' wages. As of this writing the bill is still pending.

Special tools/clothing

The regulations require the employer to provide, without charge, all "tools, supplies, and equipment required to perform the duties assigned," unless the practice in the industry is for the worker to provide tools and equipment. Without the employer meeting that requirement, even a deposit charge violates the regulations. 20 C.F.R. section 655.102(a)(3).

Meals

If the employer has centralized cooking and eating facilities, the employer must provide each worker with three meals a day. If such centralized facilities are not available, the employer must either provide a worker with three meals a day or furnish free and convenient cooking and kitchen facilities so the workers can prepare their own meals.

The employer can charge its employees for meals if the employer provides the meals, subject to a maximum of $5.26 a day. 20 C.F.R. section 655.102(b)(4). In addition, an employer may request an increase in meal charges to a maximum of $6.58 per day if the employer justifies the charge with documentation submitted to DOL's Regional Administrator (RA). 20 C.F.R. section 655.111.

Housing

Housing must be available to all non-commuting workers, without charge to the workers. The housing must be inspected by DOL before a certification can be issued. There are three sets of standards applicable to H-2A housing.

If the employer housing was constructed or under construction before April 3, 1980, the employer may have the housing inspected either pursuant to DOL standards (20 C.F.R. section 654.404-.417) or pursuant to Occupational Safety and Health Administration (OSHA) standards (29 C.F.R. section 1910.142). All other housing must meet the OSHA standards. In both cases, if more stringent local standards exist, they become applicable. It is important to note that if an employer has several separate units of housing built at different times, different sets of standards may apply.

Because the regulations require only that the employer file the H-2A application "no less than 60 calendar days before the first date on which the employer estimates that the workers are needed" ("date of need"), and since the housing inspection will not normally occur before filing such an application, the employer may need to be granted conditional access to the Interstate Clearance System (ICS) before housing approval can be obtained. The regulations provide for such conditional access if the H-2A employer files a request with DOL's RA as an attachment to the temporary alien agricultural labor certification application. 20 C.F.R. section 654.403(a)(1) and (2). Under no circumstances may an employer's H-2A application be approved unless the housing has passed inspection at least thirty calendar days before the date of need.

Range housing

Housing for workers principally engaged in the range production of livestock must meet DOL standards for such housing. No such standards have yet been approved, and interim DOL housing standards historically used for sheepherders apply. DOL Field Manual No. 108-82, July 8, 1982. These housing standards are much less demanding than the permanent site standards, reflecting the reality of home on the range.

Transportation

The regulations require an employer to advance transportation and subsistence costs if it is "the prevailing practice of non-H-2A agricultural employers in the occupation in the area to do so, or when such benefits are extended to H-2A workers." In a very recent ruling, which was issued to settle a farm worker lawsuit, *Jean v. DOL,* (Civ. No. 89-0611-OG (DDC, March 9, 1989)), INS declared that this rule applies even if the costs are advanced by a foreign government, the alien's native country. 54 Fed. Reg. 35730.

If the worker completes the contract period, the employer must provide or pay for the worker's transportation and subsistence from place of employment to either the worker's home or, if there is a subsequent employment contract, to the next worksite. The payment of transportation in this setting is an extra benefit for the worker who completes the contract, and is not optional either for a domestic or an H-2A employee. 20 C.F.R. section 655.102(b)(5)(ii).

Timing of application

The temporary agricultural labor certification application must be filed no less than 60 calendar days before the date of need. The application consists of a Department of Labor form, which is the job offer, and a separate agreement by which the employer confirms its adherence to the assurances required at 20 C.F.R. section 655.103. Since there is no DOL form for the assurances, a

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simple letter tracking the key language of that section will suffice.

Processing of the application by the RA for final determination must occur no later than twenty calendar days before the date of need. By that date, the RA must have issued a final determination regarding the labor certification. 20 C.F.R. section 655.105(d).

Once the application for certification has been accepted for processing, the RA notifies the employer exactly what recruitment efforts it must undertake to fulfill its assurances. Generally, recruitment can be broken down into three categories: positive recruitment, state employment service referrals through the interstate clearance system, and post-certification recruitment.

After completion of recruitment and the employer's detailed response to the recruitment efforts, the DOL RA determines whether its certification may be granted based upon the number of workers requested, less the number of U.S. workers successfully referred to the job order. This final number represents the maximum number of foreign workers whom the RA can certify will not have an adverse effect on a similarly situated domestic work force.

If the certification is granted for all or some of the workers requested, the employer then petitions the INS to classify identified foreign workers as beneficiaries in the H-2A category.

Filing with INS

If a petition (Form I-129B) filed by the employer is accompanied by a grant of a labor certification, the INS processing is relatively straightforward. The petition may be for single or multiple beneficiaries, may include unnamed beneficiaries, and may be filed by an employer association, an employer agent, or the employer itself.

Once the petition is granted, notice of the approval is forwarded to the U.S. consulate or consulates where the alien workers will apply for their H-2A visas.

It is important to note that the INS regulations do not require identification of all beneficiaries. With a large job order, it may not be possible for the employer to know which aliens will be accepting employment at the time the petition is filed.

While INS will accept petitions with unnamed beneficiaries, the consulate cannot issue a visa until it receives a name of an approved beneficiary, along with the notice of approval of the petition. Consequently, the consulate must have the correct identifying information about the beneficiaries to issue the actual H-2A visas.

Particular attention is paid in the DOL and INS regulations to situations in which it is alleged that the U.S. worker shortage is the result of a strike, lock-out, or walk-out. 8 C.F.R. section 214.2(h)(11)(ii); 20 C.F.R. section 655.103(a). If a strike or lock-out has occurred after DOL certification or an INS petition is approved, the RA or INS block the admission of the workers.

No-shows on the date of need/shortfalls

Often U.S. workers referred to a job order pursuant to the H-2A program do not appear on the "date of need." As a result, the employer who has been denied certification on the grounds that available U.S. workers exist is left with a ripe harvest and no harvesters. Both the DOL and INS regulations address the emergency situation produced by U.S. worker "no-shows."

The DOL regulations require the RA to verify the fact and number of no-show within 72 hours after the time a request is received for such verification. The requests must be accompanied by at least a signed statement confirming the unavailability of U.S. workers. The RA bases its determination on information provided by the local ES office.

The regulations allow the employer to make repeated requests for new determinations to fill all "no-show" slots. The same shortfall process applies to slots made open by benign personnel actions, such as voluntary resignations by domestic workers or justified terminations of domestic workers.

Grievances

Following passage of the H-2A program, DOL promulgated regulations relating specifically to enforcement of the contractual obligations between the employer and its U.S. H-2A workers. 20 C.F.R. section 658.400 *et seq.*

These regulations provide a procedure by which employees may file grievances against employers and have those grievances investigated by DOL with possible penalties, including civil money penalties, levied against offending employers.

In addition to the regulatory grievance procedure, if an employer is dealing with a unionized work force, the union contract and its provisions apply to all of the work force, including foreign workers.

DOL regulations require the employer to furnish to the worker "on or before each payday" a written statement of the worker's total earnings, whether the pay is hourly or piece rate, the hours offered, the hours actually worked, and an itemization of all deductions made. 20 C.F.R. section 655.102(h)(8).

In addition, INS regulations note that, as a condition of filing the H-2A petition, the employer agrees to allow access to its site to "determine compliance with H-2A requirements." 8 C.F.R. section 214.2(h)(e)(vi).

Editor's Note: The discussion of employer sanctions will appear in next month's Update.

Veterinarian malpractice

The case of *Carter v. Louisiana State University*, 520 So. 2d 383 (La. 1988), presents another step in the evolving area of veterinary malpractice law. *Carter* involves the liability of a veterinary specialist who caused the loss of a horse's tail by wrapping it too tightly.

A recent ALR annotation highlights how the Louisiana court, like the courts of many states, must turn to medical malpractice cases to determine the standard of skill and care required of the veterinarian. 71 A.L.R. 4th 799 (1989). The annotation explains the use of medical malpractice law to determine veterinary malpractice in several factual contexts.

The court in *Carter* relied almost solely on medical malpractice case law to establish the standards required of a veterinary specialist. Medical malpractice law is applied given the lack of available Louisiana cases considering veterinary malpractice. *See Ladnier v. Norwood*, 781 F.2d 490 (5th Cir. 1986). The veterinarian responsible must show that an unusual or unexpected result was not caused by his or her negligence. An inference of negligence is permissible when an event occurs that is within the knowledge of the veterinarian and not of the plaintiff; in some cases veterinary malpractice expert testimony may be unnecessary.

Consistent with its previous decisions, the court affirmed its abandonment of the "locality rule" and held it inapplicable to the veterinary specialist. The veterinarian who is an expert in his particular field must meet more than a community standard of care. However, the "locality rule" still applies to general veterinary practitioners.

This case appears to confirm an earlier projection that the most likely areas for litigation in veterinary malpractice would involve valuable animals such as horses. *See*, Hannah, *Veterinarians and the Law*, 3 Agric. L. Update 4 (August, 1986).

– Tom Guarino,
University of Arkansas,
School of Law

Federal Register *in brief*

The following is a selection of matters that have been published in the *Federal Register* from November 7, 1989 to December 6, 1989:

1. CCC; 1989 Tree Assistance program; final rule; effective date 11/16/89. 54 Fed. Reg. 47669.

2. CCC; Export Enhancement Program; Annual program level and review and selection of individual sales initiatives; criteria. 54 Fed. Reg. 48785.

3. BLM; National Environmental Policy Act; Revised implementing procedures. 54 Fed. Reg. 47832.

4. IRS; Treatment of partnership liabilities; allocations attributable to nonrecourse liabilities; temporary regulations; effective date 12/29/89. 54 Fed. Reg. 48090.

5. FmHA; Implementation of provisions of the Disaster Assistance Act of 1989; interim rule; effective date 11/22/89. 54 Fed. Reg. 48227.

6. FmHA; Guaranteed farmer program loans; proposed rule. "[A]ction would require credit bureau reports on new guaranteed loan applications." 54 Fed. Reg. 48770.

7. INS; Rules of practice and procedure for hearings before ALJs in cases involving allegations of unlawful employment of aliens and unfair immigration-related employment practices; final rule; effective date 11/24/89. 54 Fed. Reg. 48593.

8. INS; SAWs; Adjustment to permanent resident status; final rule; effective date 12/6/89. 54 Fed. Reg. 50339.

9. FCA; Organization and functions; service of process; final rule. 54 Fed. Reg. 50735.

– Linda Grim McCormick

AG LAW CONFERENCE CALENDAR

Ag Law Update
Jan. 18, 1990. Telephone CLE.

Topics include: Government programs; farm economics; farm credit; income taxation; farm business planning; and estate and gift taxation.

Sponsored by: ABA Section of General Practice; AALA; and USDA Cooperative Extension Service.

For more information, call 312-988-5648.

Environmental Law
February 15-17, 1990, Hyatt Regency, Washington, D.C.

Topics include: SARA, RCRA, TSCA, NEPA, Clean Water Act developments and underground water developments.

Sponsored by the Environmental Law Institute and the Smithsonian Institution.

For more information, call 1-800-CLE-NEWS or 1-215-243-1630

AALA members abroad

Two members of the American Agricultural Law Association were among the nearly 250 agricultural lawyers who attended the XVth European Agricultural Law Congress in Ghent, Belgium, October 2-6, 1989. The Congress was the biennial meeting of the European Council for Agricultural Law (CEDR). Participants represented twenty-one different countries. AALA representatives at the Congress were Neil D. Hamilton (Drake University) and Margaret R. Grossman (University of Illinois).

Activities at the Congress were organized around three topics, addressed in two Commissions and a Roundtable.

Commission I focused on the "The legal status of the real and personal property of the farm business." The U.S. report for this commission was prepared by Margaret Grossman and Keith G. Meyer (University of Kansas), and presented by Grossman. Commission II considered "The legal status of women in the farm business." Linda A. Malone (College of William and Mary) and Philip E. Harris (University of Wisconsin) prepared the U.S. report.

The Roundtable topic was "The legal consequences of set aside." Neil Hamilton spoke about U.S. set aside programs. In addition, Claudio d'Aloya (EEC Council of Ministers, Brussels), who spent academic year 1988-89 at the University of Georgia, prepared a report in French on the American experience with set aside.

The Congress in Ghent was a further opportunity for cooperation between AALA and CEDR. In September, 1987, AALA and CEDR co-sponsored the Euro-American Agricultural Law Symposium, held in Plymouth, England.

– Margaret R. Grossman, Professor, University of Illinois

State Roundup /*Continued from page 3*

ARKANSAS. *Embryo management programs and securities law.* In 1984, Tannenbaum, an Arkansas resident, entered into a breeding and management agreement with Longcrier Farms, a Texas Company. Under the agreement, Tannenbaum bought cattle embryos. Longcrier agreed to place them in recipient cows, produce calves, raise the calves to maturity, collect high-breed embryos from these calves (now cows), and market the high-breed embryos. Tannenbaum paid $25,000 down and signed a $75,000 note. Longcrier negotiated the note to First National Bank of Shreveport. Longcrier went bankrupt and Tannenbaum stopped making payments on the note. Tannenbaum then brought suit claiming the note was void because First National Bank had aided and abetted violations of the Arkansas and Federal securities laws. First National Bank countersued for collection of the note.

In *Tannenbaum v. Agri-Capital, Inc.*, 885 F.2d 646 (8th Cir. 1989), the court of appeals upheld a jury verdict for First National Bank of Shreveport. The court of appeals ruled that a factual dispute existed between Tannenbaum and Longcrier about whether Tannenbaum had the legal right to control the embryo breeding and management program. Hence, the court held that the trial judge properly allowed the jury to decide whether the breeding and management program was a security. The court also ruled that jury instructions about state and federal securities laws were correct. Consequently, the Eighth Circuit affirmed the jury verdict that the embryo breeding and management program was not a security. Tannenbaum, therefore, had no defense to the countersuit for collection of the overdue note.

– Drew L. Kershen, Professor, University of Oklahoma Law School

FLORIDA. *Legislature implements policy discouraging agricultural runoff.* Chapter 89-279, Laws of Florida, passing CS/SB 484 into law, *inter alia*, amended the agricultural element of the State Comprehesive Plan to provide that a future land use "policy" of the State of Florida shall be to "[e]liminate the discharge of inadequately treated wastewater runoff into waters of the state." Fla. Stat. section 187.201 (23)(b)(13). The policies provisions of the State Comprehensive Plan are largely discretionary guidelines.

Nonetheless, the bill as passed into law contained other provisions that may put teeth into that policy. The bill created Fla. Stat. section 373.016(2)(e), which provides that the legislative policy shall be "[t]o minimize the degradation of water resources caused by the discharge of stormwater." Moreover, the bill also created Fla. Stat. sections 373.019(16) and 373.026(10), which required the Florida Department of Environmental Regulation (DER) to implement a regulatory "State water policy," which shall set forth "goals, objectives, and guidance for the development and review of programs rules, and plans related to water resources." Section 373.026(10) further states that the State Water Policy "shall be consistent with the State Comprehensive Plan." Therefore, the legislative intent may be interpreted to require the DER to emphasize inadequately treated agricultural wastewater runoff.

– Sidney F. Ansbacher, Turner, Ford & Buckingham, Jacksonville, FL.

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