

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 October 2008

Case No.: 2009-TLC-00001

In the Matter of

FOOTHILL PACKING, INC.

Employer

Certifying Officer: Robert E. Myers
Chicago Processing Center

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), and the implementing regulations at 20 C.F.R. Part 655, Subpart B.¹ On October 9, 2008, Foothill Packing, Inc., (“Employer”) requested expedited administrative review of the certifying officer’s October 1, 2008, decision not to accept its application for temporary alien labor certification. *See* §§ 655.104(c), 655.112(a). Employer’s filing contained a brief. On October 15, 2008, the certifying officer (“CO”) filed a brief. That evening, the Office of Administrative Law Judges received the case file from the United States Department of Labor’s Employment and Training Administration (“ETA”). On October 16, 2008, I issued an *Order Setting Briefing Schedule* permitting the parties to file supplemental or reply briefs no later than 4:30 pm EDT on Friday, October 17, 2008. On October 17, 2008, Employer timely filed a reply brief.

The regulations relating to administrative review of H-2A determinations direct the administrative law judge to review the record “for legal sufficiency” and render a decision within five working days after receipt of the case file. § 655.112(a)(2). Under § 655.112(a)(1), the administrative law judge may not receive additional evidence or remand the matter in the course of this review. On the basis of the written record and after due consideration of any written submissions, the administrative law judge is required to “either affirm, reverse, or modify the OFLC Administrator’s denial by written decision.” 20 C.F.R. §655.112(a)(2).

Statement of the Case

¹ Unless otherwise noted, all regulations cited in this decision are in Title 20 of the Code of Federal Regulations.

Employer is a farm labor contractor based in Salinas, California, with an office located in Somerton, Arizona. AF 23.² On September 30, 2008, Employer filed its H-2A application with ETA's Chicago Processing Center. *Id.* In particular, Employer sought temporary alien labor certification of 260 unnamed workers to perform work for four agricultural contractors in Yuma, Arizona, and Holtville, California. *Id.* at 23-24, 26. On October 1, 2008, the CO informed Employer that its application was "not being accepted for consideration" and requested that Employer modify its application. *Id.* at 20-22. Specifically, the CO instructed Employer to "file two separate applications, one for the worksite in Arizona, and one for the worksite in California." *Id.* at 22. Instead of complying with the CO's request, Employer appealed.

Discussion

In instructing Employer to file separate H-2A applications for each worksite, the CO cited language from an ETA Training and Employment Guidance Letter ("TEGL"). *Id.*; *see* Training and Employment Guidance Letter No. 11-08, Clarification of Certain Procedures for Processing H-2A Labor Certification Applications, 72 Fed. Reg. 65,355 (Nov. 20, 2007).³ TEGL 11-08, in pertinent part, reads:

Worksite(s) Crossing State Jurisdictional Boundaries. In circumstances where a fixed-site employer has one or more worksites located in the same area of intended employment that lie in one or more state jurisdictions, the employer should file a single H-2A labor certification application concurrently with the SWA [State Workforce Agency] in the state where the work will begin and the NPC [National Processing Center] that covers this state. This provision does not apply to Farm Labor Contractors (FLCs) filing as employers. SWAs are reminded that, in circumstances where work will be performed in multiple states, unless special procedures apply, the job order for recruiting U.S. workers must be transmitted to all other state jurisdictions in which any work will take place in order that they post the opportunity in their respective job clearance system.

Id. at 65, 356. Effective June 1, 2008, the Department of Labor centralized the processing of applications by requiring all employers seeking temporary certifications to file H-2A applications with the Chicago National Processing Center ("NPC"). ETA, Foreign Labor Certification Contacts List, <http://www.foreignlaborcert.doleta.gov/contacts.cfm#npc> (last visited Oct. 22, 2008). The CO argues that the FEGL clarifies an ambiguity in § 655.101(a)(1), which reads:

Filing of application. An employer who anticipates a shortage of U.S. workers needed to perform agricultural labor or services of a temporary or seasonal nature may apply to the OFLC Administrator, for a temporary alien agricultural labor certification for temporary foreign workers (H-2A workers). A signed application for temporary alien agricultural worker certification shall be filed by the employer, or by an agent of the employer, with the OFLC Administrator. At the

² Citations to the 141-page Administrative File will be abbreviated as "AF" followed by the page number.

³ The CO misidentified the document as "*Technical and Employment Guidance Letter (TEGL) No. 11-07.*" AF 22 (emphasis added).

same time, a duplicate application shall be submitted to the SWA serving the area of intended employment.

Read with the Department's centralization policy and the regulation, the FEGL permits fixed-site employers with multiple worksites "in the same area of intended employment that lie in" multiple jurisdictions to file its application with the Chicago NPC and the State Workforce Agency ("SWA") serving the state in which the work will begin.⁴

The CO appears to argue that, since the FEGL does not apply to FLCs, Employer had to file two separate H-2A applications with the Chicago NPC for its worksites along the Arizona-California border. This construction is not supported by the FEGL's plain language. If the Department of Labor intends that a FLC must file separate applications for each state that it will provide farm workers, the FEGL's language fails to make that requirement clear. At most, the FEGL relieves fixed-site employers of the regulation-imposed duty to file applications with the SWAs of all states within the "area of intended employment." Since the FEGL does not apply to them, FLCs must still file with the SWA of each state within the area of intended employment. The scheme does not expressly require FLCs to file multiple H-2A applications with the NPC when the area of intended employment includes multiple states.

Ultimately, Employer complied with the regulatory scheme by filing a single H-2A application with the Chicago NPC for its employment needs along the Arizona-California border. While the CO's denial appears to concern only the sufficiency of Employer's filing with the Chicago NPC, Employer also complied with the regulatory scheme by concurrently filing its application with California's and Arizona's SWAs. *See* AF 25. Accordingly, I find that the CO had no legally sufficient basis for refusing to consider Employer's application.

IT IS ORDERED that the Certifying Officer's decision is **REVERSED**.

A

JOHN M. VITTON
Chief Administrative Law Judge

⁴ Pre-centralization guidance instructed all employers filing "[a]pplications involving multi-State employment within one Region" to file a single H-2A application with the appropriate Regional Administrator. Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; H-2A Program Handbook, 53 Fed. Reg. 22,076, 22,077 (June 13, 1988).