U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW - Suite 400 N
Washington, D.C. 20001-8002

Date: **February 20, 2001**

Case No.: **2001-TLC-3**
ETA Case: **5633**

In the Matter of:

SERVICIOS AGRICOLOS MEXICANOS CORP.
Respondent

BEFORE: Thomas M. Burke
Associate Chief Administrative Law Judge

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 its implementing regulations, found at 20 C.F.R. Part 655.[1] This Decision and Order is based on the written record, consisting of the Employment and Training Administration appeal file ("AF"), and the written submissions from the parties. § 655.112(a)(2).

Statement of the Case

Servicios Agricolos Mexicanos Corp. ("SAMCO") filed its H-2A application with the Region VI Regional Administrator ("RA") of the U.S. Department of Labor, Employment and Training Administration on February 5, 2001. (AF 31-33). In this application, SAMCO sought to fill forty five "Farm Worker, Fruit I" positions. (AF 31).

On that same day, the RA reviewed this application, and denied it for a number of reasons. (AF 21-24).[2] In the notice of deficiency, the RA specifically instructed SAMCO that it could either choose to modify the application or to file an appeal before this Office.

On February 7, 2001, this Office received SAMCO's *Request for Administrative Review* of the RA's decision not to accept its H-2A visa application. The certified copy of the administrative

[1]Unless otherwise noted, all regulations cited in this decision are in Title 20.

[2]The deficiencies included untimeliness, conflicting experience requirements on the forms, and mistakes regarding the description of SAMCO's recruitment plan. (AF 22-24).

file was received on February 9, 2001. Both parties were offered the opportunity to submit briefs on appeal. SAMCO's brief was received on February 13, 2001, and the RA's brief was received on February 14, 2001

Discussion

SAMCO was given the option by the RA to either file a modified application with the RA or to appeal the case to this Office. SAMCO chose to file an appeal. Despite this fact, SAMCO acknowledges that some of the deficiencies, particularly the experience requirement, were wrong in its request for review. (AF 3). SAMCO states in its request that "[t]he rest of Correction [*sic*] are done but the Number 1. (untimeliness) which is wrong." As SAMCO expressly states, the RA's denial was proper on these issues. The regulations clearly state that an administrative law judge may only affirm, reverse or modify the findings of the RA. § 655.112(a)(2). As the findings of the RA were admittedly correct, I must affirm those findings. Employer's proper course of action would have been to submit these changes to the RA as a modification, not to this Office as an appeal.

While conceding that a number of the RA's modifications were necessary, SAMCO nonetheless argues that the RA made one error. Specifically, SAMCO argues that it timely filed its application. According to the regulations, an application is "timely filed" if it is filed "no less than 45 calendar days before the first date on which the employer estimates that the workers are needed." § 655.101(c)(1). To support this proposition, SAMCO submits a receipt detailing that it sent a package by U.S. Postal Service Express Mail to the RA on January 8, 2001. (Appellant's Brief, Exhibit A). SAMCO argues that this was the date the application was sent, but that it was somehow lost by the RA, which necessitated the second filing, *i.e.*, the subject of the current application. SAMCO argues that the proper date for filing should thus be considered the date the original application was submitted, January 8, 2001, which would make the application timely. The RA argues that SAMCO must not only prove that the application was sent, but that it must prove actual receipt of the application. Therefore, the express mail receipt, without the confirmation of a return receipt, is not sufficient to meet the employer's burden of proof.

The regulations do evidence an intent that an application must be actually received in order to be considered timely.[3] However, there are no standards set for determining what constitutes actual receipt. As such, I find that an applicant bears the same burden in proving actual receipt as the applicant does in proving all aspects of the application. Accordingly, in looking at the evidence of record, I find that SAMCO has failed to prove that the application was filed less than 45 days before its date of need. It is true that SAMCO has a receipt for mailing something to the RA, and that if that package was in fact the application, it would have been timely. Further, the cover letter of the application in the record mentions that it was "the second set" that had been sent to the RA. (AF 29). However, other factors bring into question whether the application was sent and received. First, the regulations clearly indicate that the RA has seven calender days to review the application and either grant certification or issue a notice of deficiencies. SAMCO did not file a follow-up set of papers until almost a month after the original set were allegedly filed, three weeks after the determination

[3]"Any application **received** 45 calendar days before the date of need will have met the minimum timeliness of filing requirement as long as the application is eventually approved by the RA as being acceptable for processing." § 655.101(c)(1) (emphasis added).

should have been issued. If the application had been filed on January 8, it is reasonable to expect that SAMCO would have attempted to check on that application on January 15. No evidence was submitted of any attempt to track down the earlier application. Further, the current application is not a copy of the alleged original set, as would be expected if the application had been sent previously. The application in the record was signed on February 1, 2001. Finally, SAMCO offers no evidence, such as a return receipt, that the RA received the alleged original package.

Looking at the evidence submitted and the record as a whole, I find that SAMCO has not met its burden in proving that the application was submitted 45 days prior to its need and that the RA properly found that the application had not been timely filed. Accordingly, the following order shall enter.

ORDER

The Regional Administrators' denial of temporary alien agricultural labor certifications is hereby **AFFIRMED**.

at Washington, DC

THOMAS M. BURKE
Associate Chief Administrative Law Judge

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