



Issue Date: 16 April 2009

OALJ Case No.: 2009-TLC-00043
ETA Case No.: C-08364-16402

In the Matter of

THREE SISTERS FARM SERVICES,
Employer

Certifying Officer: Robert E. Myers
Chicago Processing Center

DECISION AND ORDER

On March 27, 2009, Three Sisters Farm Services (the Employer) filed a request for review of the Certifying Officer's (the CO) February 26, 2009, determination in the above-captioned temporary alien labor certification matter. During a subsequent telephone conversation, the Employer's agent requested expedited administrative review. *See* 20 C.F.R. § 655.112(a).¹ On the evening of April 7, 2009, this Office received the Administrative File from the CO. In administrative review cases, the administrative law judge has five working days after receiving the file to review the record for legal sufficiency and issue a decision. 20 C.F.R. § 655.112(a)(2).

Statement of the Case

On December 29, 2008, the Department of Labor's Employment and Training Administration (ETA) received the Employer's application for temporary labor certification for 63 farm workers. *See* AF 65, 70-71.² The Employer requested these workers to perform "minor maintenance" and harvest, grade, count, check, sort, and package beans between February 12 and May 15, 2009, under the Employer's contract with a farm in Homestead, Florida. AF 70-71. On January 5, 2009, the CO informed the Employer that its application was "not being accepted for consideration" and requested corrective modifications. *See* AF 65-67.³ The CO observed that:

Per DOL regulations at 20 CFR 655.101(b), each H-2A application must correctly describe the job offer and conditions on the form or forms prescribed by ETA. The employer is acting in the capacity of a Farm Labor Contractor (FLC), and has applied for 63 workers. The FLC certificate shows that the employer is

¹ On December 18, 2008, the Department of Labor published new rules governing this process that became effective January 17, 2009. *See* 73 Fed. Reg. 77,110 (Dec. 18, 2008). Since the Employer filed its application before the new regulations took effect, I will apply the regulatory provisions in effect at the time of the application's filing.

² Citations to the 116-page Administrative File will be abbreviated as "AF" followed by the page number.

³ The CO listed three deficiencies. Since he based his final determination on only one of these grounds, however, the other two do not warrant discussion here.

transportation authorized, and that there are enough vehicles to transport 63 workers. It appears that at least two FLC employee [sic] will be needed to transport the workers; however, the employer did not provide any FLCEs.

AF 67. The CO requested that the Employer “clarify how all 63 workers will be transported to the job site and back, and submit any required [Farm Labor Contractor Employee (FLCE)] licenses.” AF 67.

On January 13, 2009, ETA received the Employer’s modified application. AF 51. The modified application included, inter alia, Dennis Pierre’s Florida FLC license and various documents related to two company vehicles. AF 57-62. On February 2, 2009, ETA representative Tashana Stoudamire e-mailed the Employer’s agent to request that the Employer, inter alia, “clarify how all 63 workers will be transported to the job site and back, and submit any required FLCE licenses.” AF 50. Later that day, the Employer’s agent responded by submitting an illegible one-page attachment. AF 48-49. On February 9, 2009, Ms. Stoudamire e-mailed the Employer’s agent to acknowledge receipt of an unrelated modification and to renew ETA’s request that the Employer address the transportation issue. AF 36. On February 10, 2009, the Employer’s agent responded by submitting largely illegible documentation for a second driver, Hughes Blaise. AF 36-40. On February 18, 2009, Ms. Stoudamire e-mailed the Employer’s agent to explain that the documentation received for Mr. Blaise was illegible and to request a legible copy of the certificate submitted for Hughes Blaise and an additional FLCE certificate for a second driver. AF 33. On March 4, 2009, the Employer’s agent faxed copies of largely illegible documents containing both Mr. Pierre’s and Mr. Blaise’s names. AF 28-32.

Thereafter, Ms. Stoudamire, Walter Jants (whose affiliation is unclear), and Rebecca Gregory, a representative from the Florida Department of Business and Professional Regulation (FDBPR), corresponded over e-mail regarding the Employer’s failure to provide documentation. *See* AF 21-27. Several pages of the correspondence appear to be missing from the Administrative File. On March 16, 2009, Mr. Jants e-mailed Ms. Stoudamire to inform her that FDBPR reported that Mr. Pierre holds a valid Florida FLC license. AF 21. Mr. Jants noted that FDBPR does not have access to federal FLC registration records. AF 21.

On March 20, 2009, the CO denied the Employer’s application. AF 17-19. The CO explained that the Employer failed to provide legible FLCE driving authorizations for a minimum of two employees to transport the 63 workers in the Employer’s two authorized vehicles. AF 17. The CO wrote that 20 C.F.R. §653.104(b) precludes a local office from filling an agricultural job order submitted by an FLC or FLCEs without a valid FLC certificate or FLCE identification “where required by State law.” AF 18. The CO therefore reasoned that the Florida State Workforce Agency could not generate a job order necessary for the Employer to engage in positive recruitment because the Employer never provided proper FLCE identification for its drivers. AF 18. The CO wrote that he denied the application because the Employer could not engage in good faith recruitment pursuant to 20 C.F.R. § 655.101(c)(2). AF 18. The Employer’s appeal followed.

Discussion

This case turns on whether the Employer provided the CO with sufficient documentation of compliance with the registration requirements of the Migrant and Seasonal Agricultural Worker Protection Act (the MSPA). *See* 29 U.S.C. §§ 1801 *et seq.* Regulations promulgated under the MSPA require that any employee of an FLC who engages in farm labor contracting activities—including transporting migrant or seasonal agricultural workers—must obtain an FLCE Certificate authorizing such activity from the Administrator of the Wage and Hour Division of the Department of Labor’s Employment Standards Administration (the WHD). *See* 29 C.F.R. § 500.20(a), (i)-(m). The MSPA regulations also require independent contractors who perform farm labor contracting activities for FLCs to register as FLCs in their own right. *See* 29 C.F.R. § 500.20(m).

To transport the 63 workers between the Employer-provided housing and the work site, the Employer would need at least one driver for each of its two registered vehicles. The CO reasonably required the Employer to describe its transportation arrangements and submit a minimum of two FLCE certificates for employees authorized to drive the workers. Alternatively, the Employer could have submitted FLC certificates for two independent contractors retained to transport the workers. Despite the CO’s repeated requests, the Employer failed to submit to the CO a single legible certificate issued by the WHD authorizing Mr. Pierre or Mr. Blaise to drive workers under the MSPA. Since the H-2A regulation at 20 C.F.R. § 655.102(b)(5)(iii) requires that the Employer offer transportation between living quarters and the worksite “in accordance with applicable laws and regulations,” the Employer’s failure to submit evidence of compliance with the transportation provisions of the MSPA regulations gave the CO a legally sufficient basis for denying the application.

When filing its request for review, the Employer included a copy of an FLCE certificate issued by the WHD authorizing Mr. Hughes to drive migrant and seasonal agricultural workers. AF 12. Since the Employer requested that I conduct an expedited administrative review (as opposed to a *de novo* hearing), I may not receive additional evidence in reviewing the record for legal sufficiency. *See* 20 C.F.R. § 655.112 (distinguishing the two types of review offered). Documents submitted after the CO issued his determination are not part of the written record in expedited administrative review cases. Assuming *arguendo* that I could consider the document, I would still affirm the CO’s denial because the Employer submitted only a Florida FLC certificate for Mr. Pierre. Specifically, as the Employer never submitted a certificate issued by the WHD authorizing Mr. Pierre to drive migrant and seasonal agricultural workers, the Employer could only establish compliance with the transportation provisions of the MSPA regulations for one of the two drivers required. Accordingly,

It is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

A

JOHN M. VITTON
Chief Administrative Law Judge