



Issue Date: 09 March 2009

OALJ Case No.: 2009-TLC-00032
ETA Case No.: C-08329-15659

In the Matter of

CAMP RIO VISTA, INC.,
Employer

Certifying Officer: Robert E. Myers
Chicago Processing Center

DECISION AND ORDER

On February 19, 2009, Camp Rio Vista, Inc., (“Employer”) filed a request for expedited administrative review of the Certifying Officer’s (“the CO”) February 13, 2009, denial of its application for temporary alien labor certification. *See generally* 20 C.F.R. Part 655. The regulations relating to expedited administrative review of H-2A determinations direct the administrative law judge (“the ALJ”) to review the record “for legal sufficiency” and render a decision within five working days after receipt of the case file. 20 C.F.R. § 655.112(a)(2) (2008).¹ Under § 655.112(a)(1), the ALJ 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 ALJ must “either affirm, reverse, or modify the [CO’s] denial by written decision.” § 655.112(a)(2).

Statement of the Case

On November 24, 2008, the Department of Labor’s Employment and Training Administration (“ETA”) received the Employer’s application for temporary labor certification for four ranch hands. *See* AF 49-58.² On November 26, 2008, the CO accepted the Employer’s application for processing. AF 45-47. In the acceptance letter, the CO directed the Employer to submit evidence of workers’ compensation insurance coverage. AF 47. In a letter dated December 23, 2008, the Employer requested that the CO grant certification for two additional ranch hands. AF 39. The Employer enclosed, *inter alia*, an insurance certificate. AF 42. On January 26, 2009, an ETA employee sent an e-mail rejecting the Employer’s proffer as “not

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 cite to and apply the regulatory provisions in effect at the time the Employer filed its application.

² Citations to the 58-page Administrative File will be abbreviated as “AF” followed by the page number.

acceptable” and requesting that the Employer provide valid proof of workers’ compensation insurance or its equivalent. AF 35-36. He advised the Employer to contact the Texas Department of Insurance with questions about coverage requirements. AF 36. Later that day, the Employer responded by requesting an explanation. AF 35. The Employer expressed a desire to fix any deficiencies and noted that ETA had accepted the same policy from the same carrier in the past. AF 35.

On January 28, 2009, the same ETA employee responded by explaining, “The documentation that was provided as proof of worker’s compensation coverage appears to be Occupational Accident Insurance, which does not appear to cover lost benefits/wages of injured employees. This is just one example of what worker’s compensation provides.” AF 35. He added that, since the document expressly stated that the policy was not for workers’ compensation insurance, he could “not determine if this is the equivalent of the state minimum requirements.” AF 35. He closed by directing the Employer to 20 C.F.R. § 655.102(b)(2). AF 35. On January 29, 2009, the Employer responded by submitting additional policy documents and arguing that its “Occupational Accident Insurance” policy “covers most of what” workers’ compensation insurance would. AF 32-34. The Employer added that, as an elective state, Texas does not require that the Employer purchase any workers’ compensation insurance. AF 32.

On February 13, 2009, the CO denied certification. AF 29. In his denial letter, the CO summarized the e-mails exchanged between ETA and the Employer and noted that the Employer provided documentation of a policy “for Occupational Accident Insurance, not workers compensation.” AF 29. Responding to the Employer’s January 29, 2009, arguments, the CO observed that “[e]mployers are required to obtain workers compensation or equivalent [coverage] to take part in the H-2A program regardless of whether or not the state requires” it. AF 29. Since the CO concluded that the Employer did not comply with 20 C.F.R. § 655.102(b)(2), he denied certification. AF 29. The Employer’s appeal followed.³

Discussion

The regulations governing administrative review of H-2A determinations direct the administrative law judge to review the record “for legal sufficiency.” § 655.112(a)(2). Since the regulations do not define “legal sufficiency,” I apply an arbitrary and capricious standard when conducting expedited administrative review under § 655.112(a)(2). *See Bolton Springs Farm*, 2008-TLC-28, slip op. at 6 (A.L.J. May 16, 2008). The CO found only that the Employer failed to establish compliance with 20 C.F.R. § 655.102(b)(2), which provides:

Workers’ Compensation. The employer shall provide, at no cost to the worker, insurance, under a State workers’ compensation law or otherwise, 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’

³ To the request for expedited administrative review, the Employer attached additional insurance policy documents that the CO did not consider in making his decision. *See* AF 4-28. The regulations limit expedited administrative review of the CO’s decision to the record that was actually before the CO by precluding the ALJ from receiving additional evidence. *See* 20 C.F.R. § 655.112(a)(1). Accordingly, despite the fact that ETA included these documents in the administrative file, I will not consider them in reaching my decision.

compensation law, if any, for comparable employment. The employer shall furnish the name of the insurance carrier and the insurance policy number, or, if appropriate, proof of State law coverage, to the OFLC administrator prior to the issuance of a labor certification.

The record supports the CO's determination that the Employer has not obtained workers' compensation insurance, and, in its request for review, the Employer conceded as much. *See* AF 1.

While an employer may also comply with the regulation by purchasing insurance that would "provide benefits at least equal to those provided by" Texas workers' compensation law, the regulation places the burden of proof on the employer. *See* 20 C.F.R. § 655.102(b)(2); *Dairy Fountain, Inc.*, 2009-TLC-13, slip op. at 4 (A.L.J. Nov. 26, 2008). The record supports the CO's finding that the Employer failed to establish that its occupational accident policy would provide benefits at least equal to those provided by Texas workers' compensation law. Specifically, beyond observing that Texas does not require employers to carry workers' compensation insurance, the Employer did not invoke Texas workers' compensation law. Without establishing the limits of its potential liability under Texas workers' compensation law, the Employer could not meet its burden to prove that its policy's provisions meet the minimum requirements. Accordingly, I find that the CO had a legally sufficient basis for denying certification.

Understandably, the Employer has expressed frustration over the fact that, in prior years, ETA has accepted the same policy from the same carrier. However, that fact should not estop ETA from fulfilling its duty to protect workers' interests this year. Accordingly, **IT IS ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

A

JOHN M. VITTON
Chief Administrative Law Judge