

U.S. Department of Labor

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Issue Date: 30 July 2010

OALJ Case No.: 2010-TLC-00090

ETA Case No.: C-10183-24605

In the Matter of

CHARLES HEAD JR.,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

On July 22, 2010, Charles Head Jr., (“the Employer”) filed a request for review of the Certifying Officer’s determination in the above-captioned temporary agricultural labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.115(a) (2009). On July 23, 2010, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“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. § 655.115(a).

Statement of the Case

On July 2, 2010, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from Charles Head Jr. ("the Employer") for temporary labor certification. AF 63-70.¹ In particular, the Employer requested certification for five "Farmworkers and Laborers; Agricultural" between August 3, 2010, and December 15, 2010. AF 63.

On July 9, 2010, the CO issued a Notice of Deficiency, which gave the Employer five business days to modify its application. AF 35-47. For the purposes of this appeal, the CO identified two deficiencies. AF 37-38. Citing to 20 C.F.R. § 655.130(b), the CO stated that temporary labor certification applications should be filed no less than 45 calendar days before the employer's date of need, but the Employer filed less than 45 days before the date of need. AF 37. As a result, the CO required the Employer to "provide a written explanation as to why it failed to comply with the application filing requirements." *Id.* The CO also noted that unless the Employer could provide "good and substantial cause" for filing late, the Employer would be required to change the date of need. *Id.* The CO also cited to 20 C.F.R. § 655.130(a), and stated that section F(b) of the Employer's application contained "blurred text which makes the material very difficult to read." AF 38. As a result, the CO required the Employer to amend the section "to provide clearer text." *Id.*

On July 9, 2010, the Employer responded to the NOD. AF 10-34. The Employer returned the checklist of deficiencies contained in the NOD, and the Employer had circled and checked each item. AF 12. In reference to the blurred text, the Employer's response provided a "corrected" copy of the ETA 9142. AF 18. However, the text still appears blurry and difficult to read, although the text is darker. *Id.* The Employer's response did not address its reasons for filing less than 45 days before its date of need. AF 10-34.

¹ Citations to the 70-page Administrative File will be abbreviated "AF" followed by the page number.

On July 16, 2010, the CO denied the Employer's application. AF 7-9. Citing to 20 C.F.R. § 655.130(b), the CO stated that it received the employer's response to the NOD, but the Employer "failed to provide good and substantial cause for filing less than 45 days before the date of need and the employer failed to change the start date of need." AF 9. The CO also cited to 20 C.F.R. § 655.130(a) and stated that "the employer failed to amend the text in Section F(b) . . . so that it was easier to read and replicate." *Id.* Having found that the Employer failed to satisfy both deficiencies, he denied certification. The Employer's appeal followed.

In its request for review, the Employer stated that the regulations require an explanation and proof if an Employer files an application less than 45 days before the date of need, and as a result, the Employer "submit[ed] a full page explanation as to the reason for not changing the date." AF 1. The Employer explained in its request for review that it had problems with the State Workforce Agency ("SWA") that was beyond its control, and thus, the Employer was not at fault for filing less than 45 days before its date of need. *Id.* The Employer also stated that it amended section F(b), so that it was readable. AF 2. As proof that the copy was legible, the Employer referred to its employee, who suffered from an eye disease, and stated that the employee could read it, so the Employer assumed everyone else could as well. *Id.* The Employer also attached copies of all the documents it allegedly sent to the CO. The "copies" contained a letter to the CO addressing the delay with the SWA and justifying its need to file less than 45 days prior to the date of need. AF 5. The letter gave the CO permission to adjust the Employer's date of need if this explanation did not satisfy the "good and substantial" cause requirement. *Id.* The Employer also attached a "revised" ETA 9142 in order to show the readability of the document, but the Employer did not attach the correct section to its request for review.

Discussion

An employer seeking labor certification must file its application with the ETA not less than 45 calendar days "before the Employer's date of need." 20 C.F.R. § 655.130(b). It is undisputed that the Employer filed its application less than 45 calendar days before its date of

need. Therefore, the only issue is whether the Employer submitted a document which explained the failure to file earlier, or in the alternative, gave the CO permission to change its date of need.²

Both the CO and the Employer adamantly disagree about whether the Employer submitted an explanation for its late filing. The CO maintains that it never received the Employer's explanatory letter, while the Employer argued that it did submit the letter along with the other documents contained in its response. Ultimately, the burden to prove labor certification rests squarely with the Employer, and as it pointed out in its brief, it has no real way of proving that it attached the letter to the documents it transmitted to the CO. Though not conclusive, the Employer also claimed that it amended section F(b) of the ETA 9142. While that issue is no longer pending before the Board, after a careful study of the original document and the "amended" document, any difference, other than slightly darker text which may be attributed to a difference in a printer or copier, the amended document is identical to the original one. Further, when the Employer attached a "copy" of its amendments to its request for review, the Employer attached the wrong section of the application and failed to attach the disputed page. While this oversight is not determinative, it does lend credence to the CO's claim that the appeal file was properly put together, and thus, the Employer simply failed to attach the letter explaining the late filing. Regardless, the Employer bears the burden of proof, and since it failed to prove that it submitted the required documentation, the CO properly denied certification.

² In CO's brief, it stated that the failure to justify the Employer's late filing was the only remaining issue on appeal. Therefore, the Board will not review the CO's denial based on the failure to correct section F(b) as a basis to affirm or reverse the CO's denial of certification.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

Washington, D.C.

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