

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 June 2010

OALJ Case No.: 2010-TLC-00035

ETA Case No.: C-10110-24090

In the Matter of

JARED ADRIAN SOD SERVICE,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER

On May 28, 2010, Jared Adrian Sod Service (“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 June 4, 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 April 28, 2010, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from Jared Adrian Sod Service ("the Employer") for temporary labor certification. AF 47-62.¹ In particular, the Employer requested certification for 10 "Farmworkers and Laborers, Crop, Nursery and Greenhouse" between June 6, 2010, and December 31, 2010. AF 47. The Employer's application was accepted for processing on April 28, 2010.² AF 14-18. The Notice of Acceptance ("NOA") instructed the Employer, *inter alia*, that "in order to receive a labor certification, [the Employer] must also submit evidence that [the Employer had] obtained workers' compensation coverage for [the Employer's] employees. Such evidence, including the name of the insurance carrier and the policy number or proof of State law coverage, must be submitted to this office at the same time that [the] recruitment report is due." AF 17.

On May 26, 2010, the CO denied the Employer's application for temporary labor certification. AF 7-10. Citing to 20 C.F.R. § 655.122(e)(1), the CO stated that the Employer failed to submit proof of workers' compensation insurance coverage. Because the CO did not receive the required documentation, the application was denied. The Employer's appeal followed.

In its request for review, the Employer asserted that the proof of workers' compensation insurance coverage was attached to the initial application. AF 1-2. However, the Employer also admitted that it has no proof that the CO received the evidence of coverage. Moreover, the Employer also argued that the CO had multiple opportunities to address the Employer's lack of proof, including during the Notice of Deficiency, but the CO failed to do so. The Employer submitted proof of its workers' compensation insurance coverage along with its recruitment report.

¹ Citations to the 62-page Administrative File will be abbreviated "AF" followed by the page number.

² Before the application was accepted for processing, the Employer made modifications pursuant to a Notice of Deficiency issued on April 23, 2010. However, the Employer corrected the deficiencies, and they are unrelated to the present appeal.

Discussion

An employer seeking labor certification must submit proof of workers' compensation insurance coverage prior to the "issuance of the temporary labor certification." 20 C.F.R. § 655.122(e). In the present case, the NOA provided that the Employer must submit proof of insurance coverage at the time that the recruitment report was due. AF 17.

It is undisputed that the Employer was required to submit proof of workers' compensation coverage prior to the grant of certification. A review of the record reveals that the Employer failed to submit this proof to the CO prior to certification. Although the Employer claims that it submitted the proof with its initial application, it has offered the Board no evidence of the submission. Further, although it is clear from the Employer's request for review that it did in fact have the proper documentation, the Board is limited to reviewing only the "written record" as it appeared before the CO. 20 C.F.R. 655.171(a).³ Likewise, the Board cannot force the CO to accept documentation submitted after the Final Determination was issued.

The Employer also argued that the CO failed to comply with the deadlines given in the regulations for issuing a decision. However, the timeliness of the CO is not a valid defense for the Employer's failure to comply with regulations by submitting required documentation, especially when the CO placed the Employer on notice through the NOA. Likewise, despite the Employer's assertion that the CO should have included information about the proof of insurance in the April 23, 2010 Notice of Deficiency ("NOD"), the CO had no reason to include this information. At the time the NOD was issued, the proof of insurance was not required, and thus, not a deficiency. In fact, the proof of insurance does not need to be submitted until immediately before certification. Rather, the CO properly included a notice that proof of insurance needed to be submitted in the NOA, along with a multitude of instructions that the Employer accurately followed. The Employer was properly placed on notice that the proof of insurance was needed, and even if it thought that the proof of insurance had already been submitted, the NOA certainly

³ The Employer had the opportunity to request a de novo hearing pursuant to 20 C.F.R. § 655.171, during which it could have presented new evidence, including additional documentation regarding proof of insurance as well as testimony from its agent regarding the submission of the proof of insurance. However, the Employer requested an administrative review, which limits the review to the written record and does not afford the Employer the chance to submit new evidence.

put the Employer on notice that the CO had not received the proof. Since the Employer failed to submit the required documentation to the CO, certification was properly denied.

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