



Issue Date: 12 July 2010

OALJ Case No.: 2010-TLC-00049

ETA Case No.: C-10137-24254

In the Matter of

MONTE KESEY FARMS,
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 June 25, 2010, Monte Kesey Farms (“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 2, 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 May 17, 2010, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from Monte Kesey Farms ("the Employer") for temporary labor certification. AF 66-74.¹ In particular, the Employer requested certification for 25 "Farm Laborers" between July 1, 2010, and September 30, 2010. AF 66. The Employer's application was accepted for processing on June 7, 2010. AF 29-33. The Employer was issued a Notice of Deficiency ("NOD") on May 24, 2010, addressing four deficiencies that are not related to this appeal. AF 49-56. The CO also included the following in the NOD: "Please Note: Prior to Final Determination, the employer must provide documentation showing enrollment in a workers' compensation insurance policy." AF 34.

On June 8, 2010, the CO faxed a copy of the Employer's insurance policy ("policy")² to the Texas State Workforce Agency ("SWA") in order to determine "if [the policy] is sufficient for Texas to approve as a Workers' Compensation Policy." AF 41. On June 8, 2010, the SWA replied to the CO via email that "Worker compensation coverage is a DOL H-2A requirement and [the CO's] supervisor . . . should be able to answer your questions." AF 39.

On June 18, 2010, the CO denied the Employer's application for temporary labor certification. AF 26-28. The CO noted in its denial letter that the Employer submitted a "Blanket Accident Policy that explicitly states this [wa]s not a policy of Workers Compensation Insurance." AF 28. The CO therefore found that the Employer did not provide proof of the required workers' compensation insurance and denied labor certification. *Id.*

On June 21, 2010, the Employer stated in an email to the CO:

We have received a denial on the above case based on "employer failed to prove worker's compensation covering injury or disease."

¹ Citations to the 80-page Administrative File will be abbreviated "AF" followed by the page number.

² Based on the record, it is unclear when the Employer submitted the insurance policy to the NPC.

We have advised the employer of the denial and he is looking to remedy this and get standard workers compensation insurance. In years past—this type of insurance had been acceptable so we were unaware that this would be a problem.

AF 29. In its request for review, the Employer argued that it “had not received a Notice of Acceptance, been informed to place employment ads, and according to procedures should not have been to the point of a Final Determination.” AF 1. The Employer further argued that the Employer did not need to submit proof of insurance until after the Notice of Acceptance (“NOA”) had been issued, and since the proof of workers’ compensation insurance was not a deficiency listed on the NOD, the CO improperly denied certification.

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).

The regulations do not provide an exact timeframe within the labor certification process for the employers to submit proof of workers’ compensation insurance. Rather, the regulations simply require that the policy be submitted prior to labor certification. The Employer argued that the CO has established a policy that the workers’ compensation insurance policy will be due after an NOA has been issued in a labor certification matter. Whether the CO has established such a policy, however, is not relevant for the present case.

It is apparent from the record that the Employer understood it needed a workers’ compensation policy; indeed, the NOD put the Employer on notice that proof of a policy would be required in the near future. Equally obvious is that the Employer submitted the policy to the CO for the purpose of satisfying the workers’ compensation requirement. The CO, after a review of the policy, found that it did not satisfy the regulatory requirements, and therefore denied certification. Moreover, the June 21, 2010 email from the Employer makes it clear that the Employer did not intend to submit a subsequent policy—that the Employer assumed that the policy would satisfy the regulations. Therefore, even if the CO had issued an NOA, it would

have been nothing more than a delay of the inevitable. Once the NOA had been issued, the Employer would have taken no further action in terms of its policy because “in years past—this type of insurance had been acceptable.” Therefore, when the CO subsequently analyzed the file prior to labor certification, the policy would still not meet the regulatory requirements and a subsequent denial would have been forthcoming. The Employer cannot preemptively submit documentation, and then when the CO makes a determination based on the documentation, claim procedural due process. The Employer chose to submit the policy before the NOA was issued, and nothing in the record indicates that the Employer intended to submit any other type of insurance policies to the CO. The Employer cannot now claim that the CO acted procedurally improper because he analyzed the Employer’s documentation in an efficient manner and determined that issuing a denial would be more appropriate than an NOA, given the Employer’s submissions. The Employer submitted an insurance policy that did not satisfy the requirements of the H-2A workers’ compensation regulatory requirements, and therefore, the CO properly denied certification.

Order

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

For the Board:

A

WILLIAM S. COLWELL
Associate Chief Administrative Law Judge