

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 July 2010

OALJ Case No.: 2010-TLC-00064

ETA Case No.: C-10133-24237

In the Matter of
PUMPKIN PATCH FUNDRAISERS, INC.,

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 7, 2010, Pumpkin Patch Fundraisers, Inc., (“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 19, 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 13, 2010, the Department of Labor's Employment and Training Administration ("ETA") received an application for temporary labor certification from Pumpkin Patch Fundraisers, Inc., ("the Employer"). AF 139-148.¹ The State Workforce Agency ("SWA") accepted the Employer's job order on May 18, 2010. AF 98.

The CO issued a Notice of Deficiency ("NOD") to the Employer on May 20, 2010. AF 76-94. Citing to 20 C.F.R. § 655.121(a)(1),² the CO stated that pursuant to H-2A regulations, the Employer must submit a job order to the SWA prior to filing an application for labor certification. AF 78. The CO further noted that "the employer must submit this job order no more than 75 calendar days and no fewer than 60 calendar days³ before the date of need." *Id.* The CO required the Employer to "provide a written explanation as to why the employer failed to comply with the pre-filing requirements." AF 78.

On May 28, 2010, the Employer responded to the NOD. AF 49-75. The Employer wrote: "In past years we have sent at the same time to both agencies. We have received the Job Order from the SWA of NM and a copy is enclosed." AF 49.

On June 29, 2010, the CO denied the Employer's application. AF 31-34. Again citing to 20 C.F.R. § 655.121(a)(1), the CO noted that at the time the CNPC received the Employer's application on May 13, 2010, the Employer "failed to indicate that the job order was placed [with the SWA] no fewer than 60 days before and no more than 75 calendar days before the date of need." AF 33. According to the CO, the job order enclosed by the Employer also indicated that the "earliest date to display" was May 18, 2010, and a "Print date" of May 20, 2010. *Id.* The CO stated that both of these dates were more than 75 calendar days before the Employer's start

¹ Citations to the 150-page appeal file will be abbreviated "AF" followed by the page number.

² The NOD listed numerous deficiencies, but only one will be addressed on appeal.

³ Given the Employer's date of need of August 20, 2010, the Employer needed to file a job order with the SWA from June 5, 2010 to June 20, 2010.

date of August 20, 2010. The CO found that the Employer failed to comply with H-2A pre-filing requirements, so he denied certification. The Employer's appeal followed.

In its Request for Review, the Employer admitted that it filed the job order more than 75 days before the date of need, but "in the past six years, [the Employer] had to file 120 calendar days before the date of need." AF 1. After the enactment of new regulations, the Employer stated that it attended a webinar, where it "misunderstood" that the job order needed to be filed "90 days." *Id.*

Discussion

The H-2A regulations require that:

Prior to filing an *Application for Temporary Employment Certification*, the employer must submit a job order, Form ETA-790, to the SWA serving the area of intended employment for intrastate clearance, identifying it as a job order to be placed in connection with a future *Application for Temporary Employment Certification* for H-2A workers. The employer must submit this job order no more than 75 calendar days and no fewer than 60 calendar days before the date of need.

20 C.F.R. § 655.121(a)(1).

In its Request for Review, the Employer admitted that it failed to follow the new regulations due to a misunderstanding. However, the Employer learned of the new requirements, at the very latest, when the CO issued an NOD on May 20, 2010. Given that the regulations would not allow the Employer to file a job order with the SWA until June 5, 2010 at the earliest, the Employer could have simply refilled its application at a later date in order to comply with the requirements. However, the Employer did not take this route, and unfortunately, it has no defense for failing to comply with the regulatory deadlines. Because the Employer failed to file a job order with the SWA within the specified timeframe, 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:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

Washington, D.C.
WSC:AH