



**Issue Date: 21 October 2010**

**OALJ Case No.: 2010-TLC-00158**

**ETA Case No.: C-10237-24948**

*In the Matter of*

**SOLIS FARMS, INC. d/b/a BC HARVESTING, CO.,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago Processing Center

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

### **DECISION AND ORDER**

On September 29, 2010, Solis Farms, Inc. d/b/a Harvesting, Co., (“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 October 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).<sup>1</sup>

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<sup>1</sup> The present decision was not issued within the five day time frame due to confusion over the appeal file. When the Employer requested an administrative review of this case, it also requested a review of a second case with a different ETA number. When the Employer sent the request for review to this office, it noted the wrong ETA number on its cover letter, and therefore, the wrong appeal file was requested from the CNPC.

## Statement of the Case

The facts of this case are relatively undisputed. On September 3, 2010, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from Solis Farms Inc. d/b/a BC Harvesting Co. ("the Employer") for temporary labor certification. AF 70-79.<sup>2</sup> On September 10, 2010, the CO issued a Notice of Deficiency ("NOD"), which identified five deficiencies. AF 17-60. The NOD instructed the Employer that it had five business days to make the requested modifications, or pursuant to 20 C.F.R. § 655.142(c), the Employer could appeal the NOD to the BALCA. AF 17-18. More importantly, the CO stated that if the Employer filed a late modification, the CO would delay the final determination day-for-day as allowed under 20 C.F.R. § 655.141. However, the CO also noted that if the Employer did not submit a modified application within twelve calendar days, the application would be considered abandoned.<sup>3</sup> AF 18. The Employer did not submit a modified application or request an administrative review; as a result, the CO denied the application on September 24, 2010. AF 11-12.

On September 29, 2010, the Employer appealed the CO's denial to the Board. AF 1-10. In its request for review, the Employer stated that it did not respond to the modification because it could not "produce the correct bond." AF 1. The Employer also submitted a copy of its bond along with its modified application. AF 1-10.

## Discussion

Modified applications "will be deemed abandoned if the employer does not submit a modified [application] within 12 calendar days after the notice of deficiency was issued." 20 C.F.R. § 655.142(a). If the Employer chooses to pursue an administrative review or *de novo* hearing rather than modify its application, the Employer must "file by facsimile or other means normally assuring next day delivery a written request" to the Board within "five business days of the receipt of the notice." 20 C.F.R. § 655.141(b)(4). When pursuing an administrative review,

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<sup>2</sup> Citations to the 79-page Administrative File will be abbreviated "AF" followed by the page number.

<sup>3</sup> The Employer and CO communicated about the application through a series of emails, and on September 15, 2010, the CO reminded the Employer to submit its modified application by the timeframe indicated in the NOD. AF 13.

the Board is limited to reviewing the appeal “on the basis of the written record. . . which may not include new evidence.” 20 C.F.R. § 655.171(a).

The Employer received its NOD on September 10, 2010. At that time, the Employer had two options: it could modify its applications within twelve calendar days or it could appeal the NOD to BALCA within five business days. The Employer chose to do neither. Nothing in the record indicates that the Employer attempted to appeal the NOD to the Board, and likewise, the Employer admits in its request for review that it failed to respond to the NOD with a modified application. Moreover, whether the new evidence submitted with its request for review would cure the deficiencies cited in the NOD is irrelevant, since the evidence is not properly before the Board. Therefore, pursuant to 20 C.F.R. § 655.142, the Employer abandoned its application. The CO, especially without further communication from the Employer, cannot be expected to hold applications in the queue indefinitely. Therefore, after 12 calendar days passed without response from the Employer, 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