

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 April 2010

OALJ Case Nos.: 2010-TLC-00027

ETA Case Nos.: C-10075-23923

In the Matter of

WHITE & ALLEN FARMS, INC.

Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

APPEARANCES: Sarah Farrell, Lay Representative
404 North Poplar Street
Aberdeen, North Carolina,
For the Employer

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For the Certifying Officer

BEFORE: William S. Colwell
Associate Chief Administrative Law Judge

DECISION AND ORDER

On April 8, 2010, White & Allen Farms, Inc., (“the Employer”), filed a request for a de novo hearing reviewing 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 April 15, 2010, the Office of Administrative Law Judges

received the Administrative File from the Certifying Officer (“the CO”). When a party requests a de novo hearing, the administrative law judge has five calendar days to schedule a hearing after receipt of the appeal file, and ten calendar days after the hearing to render a decision. 20 C.F.R. § 655.115(a).

Statement of the Case

Appeal File

On March 12, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from White & Allen Farms, Inc., (“the Employer”) for temporary labor certification. AF 1-2.¹ On the same day, the Certifying Officer (“CO”) returned the March 12th application to the Employer, noting on the coversheet that the application was incomplete. AF 6. In particular, the coversheet specified that the application had a “missing or incomplete Appendix A.1 (Multiple Crops)” and a “missing or incomplete Appendix A.2 (with **Original Signatures**).” AF 6. The Employer resubmitted the application to the ETA on March 16, 2010. AF 62. On April 6, 2010, the CO denied the Employer’s application based on four deficiencies. AF 62-64.² The Employer’s request for a de novo hearing followed.

De Novo Hearing

Per the parties’ agreement, a de novo hearing was held on April 20, 2010. At the hearing, three exhibits were admitted, including the 155-page administrative file. Tr. 6-11. The CO stipulated at the hearing that the application was for a single crop, and therefore did not need an “Appendix A.1 (multiple crops)” (“multiple crop appendix”) as indicted on the coversheet

¹ Citations to the 155-page Administrative File will be abbreviated “AF” followed by the page number.

² On February 12, 2010, the Department of Labor published new rules governing the H-2A program with an effective date of March 15, 2010. *See gen.* 75 Fed. Reg. 6,884 (Feb. 12, 2010). The Employer contends that the application sent on March 12, 2010, was complete, and therefore, its application should have been processed under the previous rules governing H-2A applications. However, the CO contends that the completed application was not received until March 16, 2010, and thus, the application falls under the new rules. The Employer does not dispute that the application did not comply with the new regulations. Therefore, the only real question before this Board is whether the ETA received a complete application on March 12, 2010, or March 16, 2010, and thus, which rules should have governed the processing of the application.

attached to the original application. However, the CO did maintain that the original application was missing “Appendix A.2 (with Original Signatures).”

The Respondent presented two witnesses at the hearing. Ms. Chris Gonzalez testified to the general procedures of the Chicago National Processing Office (“CNPC”) concerning the initial processing of applications. Mr. Stephen Head, a lead analyst at CNPC, testified that his job entailed providing assistance to all analysts that process H-2A and H-2B applications within his work group. Tr. 40-41. Mr. Head further testified that he processed the Employer’s initial March 12, 2010, application. Tr. 41. Specifically, Mr. Head testified that upon processing of the March 12th application, he noticed that the application was missing page “A-1 of appendix A-2” (“signature page”). Tr. 41.

The Employer presented one witness, Ms. Theresa Ward, at the hearing. Tr. 48. Ms. Ward testified that she has been filing H-2A applications for the Employer’s representative for approximately eight years. Tr. 49. According to Ms. Ward, the application contained the signature page when she submitted the application to the ETA. Tr. 50. Ms. Ward also testified that it was the practice of the office to copy all the documents contained in an application before it is submitted for processing. Tr. 51-52. Accordingly, Ms. Ward stated that she copied all of the pages from the Employer’s application before she submitted it to the ETA. *Id.* After the March 12th application was returned to the Employer, Ms. Ward testified that she checked her copy of the file, and noted that the signature page was in the copied file. Tr. 52. Further, Ms. Ward stated that when she received the returned file from the ETA, she immediately checked the returned application and found that the signature page was not missing but was rather included in the returned materials from the ETA. Tr. 52. After making sure the pages were intact, Ms. Ward testified that she sent the application back to the ETA without any alterations or additions. Tr. 53-54.

Discussion

The only issue before the Board is whether the application received on March 12, 2010, contained a signature page. If the application did contain a signature page, then the CO

incorrectly processed the application under the new H-2A regulations, which became effective March 15, 2010. After reviewing the record and all the testimony presented at the hearing, I find that the original application contained the signature page, and thus, the CO wrongly processed the application under the new rules.

In arriving at this conclusion, I find that the testimony of Ms. Ward was highly credible. Not only did her testimony reveal that she made a copy of the application, which she later verified contained the signature page, but upon receipt of the returned application, she specifically remembered checking and finding the signature page after reading the ETA's reasoning for returning the application. Her testimony is given further credence by the coversheet attached to the original application by Mr. Head. The coversheet noted that not only was the signature page missing from the application but indicated that the application was missing an appendix related to multiple crops. However even a brief scan through the Employer's application revealed that the Employer was only working with a single crop, and therefore, the multiple crop appendix was unnecessary. If the analyst incorrectly determined that the Employer was missing the multiple crop appendix when the application clearly indicated otherwise, it becomes increasingly more likely that the analyst also overlooked the signature page. Since the Employer submitted a complete application prior to the March 15, 2010 effective date of the new regulations, the CO incorrectly processed the Employer's application under the new regulations.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's decision is **REVERSED** and **REMANDED** for processing consistent with this opinion.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

