

U.S. Department of Labor

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Issue Date: 08 July 2010

OALJ Case No.: 2010-TLC-00048

ETA Case No.: C-10134-24248

In the Matter of

WINSOME FARMS, LLC,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER
REVERSING DENIAL OF CERTIFICATION

On June 25, 2010, Winsome Farms, LLC, (“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 30, 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 14, 2010, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from Winson Farms, LLC, ("the Employer") for temporary labor certification. AF 82.¹ In particular, the Employer requested certification for three "Farmworkers and Laborers, Crop" between July 1, 2010, and April 30, 2011. *Id.* The Employer's application was accepted for processing on June 7, 2010.² AF 29-33. 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 32.

On June 14, 2010, the Employer submitted a copy of its workers' compensation insurance policy. AF 18. The policy showed an effective date of March 27, 2010, until March 27, 2011. *Id.* On June 15, 2010, the CO sent an email to the Employer, which stated: "We have received the employer's proof of workers' compensation; however, the expiration date on this policy is March 14, 2011. The employer's requested end date of need is April 30, 2011. The employer must submit a written assurance signed by the employer that workers' compensation will be provided for the duration of the contract period." *Id.*

On June 18, 2010, the CO denied the Employer's application for temporary labor certification. AF 10-12. The CO noted in its denial letter that he contacted the Employer via email or fax on June 15, 2010, and June 18, 2010, but he did not receive a response from the Employer. AF 12. 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 that covered the entire period of need. *Id.* Because the CO did not receive a written assurance that the workers' compensation

¹ Citations to the 98-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 May 21, 2010. AF 56-73. However, the Employer corrected the deficiencies, and they are unrelated to the present appeal.

would be provided for the duration of the period of need, the application was denied. The Employer's appeal followed.

In its request for review, the Employer asserted that on June 15, 2010, the Employer submitted via fax to the CO an assurance that it would extend its workers' compensation policy to cover the date of need. AF 1-2. The Employer noted that the CO's June 15, 2010 email incorrectly listed the expiration of the insurance policy as March 14, 2011, when the policy actually ended on March 27, 2010. *Id.* Additionally, the Employer admitted receiving and subsequently responding to the June 15, 2010 email, but it denied receiving any subsequent communication from the CO on June 18, 2010. *Id.* Finally, the Employer attached a fax confirmation, which showed that a fax was successfully sent from the Employer's machine to the CO's number on June 15, 2010 at 3:56 p.m. AF 5. The Employer also attached the written assurance that it asserted was sent during the June 15, 2010 fax transmission. *Id.*

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 18.

It is undisputed that the Employer submitted proof of insurance which ended approximately one month before the Employer's date of temporary need ended. Given the gap in coverage, the CO properly requested an assurance from the Employer that it would renew the policy, thus ensuring that the Employer's workers were protected. However, after a review of the record, it is clear that the Employer properly complied with the CO's request in a timely fashion. The Employer has adequately proven in its Request for Review that it submitted a fax to the CO according to the CO's instructions, and that the fax contained a written assurance that the policy would be renewed. The Employer's assertions are confirmed by the state of the appeal file in the present case. Not only did the CO confuse the end date of the policy when he notified the Employer in the June 15, 2010 email, but the CO also claimed in its denial letter that

it communicated a second time with the Employer on June 18, 2010. The appeal file, however, contains no mention of a subsequent communication. If the appeal file is missing information that the CO definitely had in his possession given that the June 18, 2010 fax/email *originated* with the CO, it is equally likely, given the strength of the Employer's evidence, that the Employer's June 15, 2010 fax submission was also misplaced by the CO. After a careful review of the record, it is apparent that the Employer submitted both proof of workers' compensation insurance and a written assurance that the insurance policy would be extended to cover the entire date of need. The Employer, therefore, fully complied with the H-2A regulations, and the CO incorrectly denied certification.

Order

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

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge