



Issue Date: 05 November 2009

OALJ Case No.: 2010-TLC-00005
ETA Case No.: C-09240-20401

In the Matter of

JAIME CAMPOS,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Appearances: Jaime Campos
Pro se for the Employer

Gary M. Buff, Associate Solicitor
Jonathan R. Hammer, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

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

DECISION AND ORDER
AFFIRMING CO'S DENIAL OF CERTIFICATION

On October 26, 2009, Jaime Campos¹ (the Employer) filed a request for review of the Certifying Officer's (the CO) determination in the above-captioned temporary agricultural labor certification matter. During an October 29, 2009, telephone conversation, the Employer stated that he sought administrative review rather than a de novo hearing. *See* 20 C.F.R. § 655.112 (2009) (describing the two types of review available).² On October 30, 2009, the CO submitted

¹ The Employer sometimes refers to itself as "Workonection, LLC" in the documentation submitted. However, on the H-2A application, the Employer lists its legal name as "Jaime Campos."

² On December 18, 2008, the Department of Labor published new rules governing this process that became effective January 17, 2009. *See* 73 Fed. Reg. 77,110 (Dec. 18, 2008). Subsequently, on March 17, 2009, DOL issued notice of proposed rule making, proposing to suspend the 2008 Rule for nine months and reinstate the 1987 rule. On May 29, 2009, DOL issued the new H-2A rule, scheduled to take effect on June 29, 2009. *See* 74 Fed. Reg. 25,972 (May 29, 2009). However, on July 1, 2009, in *North Carolina Grower's Assoc., Inc. v. U.S. Dept. of Labor*, the United

the Administrative File. In expedited 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. 20 C.F.R. § 655.115(a).

Statement of the Case

On August 28, 2009, the Department of Labor's Employment and Training Administration (ETA) received the Employer's application for temporary labor certification for 300 farm workers. AF 83-92.³ The Employer requested these workers to "manually plant, cultivate and harvest vegetables, fruits, nuts and field crops" at multiple locations in southern New Mexico. AF 85, 94. On September 3, 2009, the CO informed the Employer that his application was "not being accepted for consideration" and requested corrective modifications. AF 57-63.⁴ The CO observed that:

Per DOL regulations at 20 CFR 655.101(b)(3), the employer must provide the exact location, beginning and ending dates, and crop activity for each specific location in which work will be performed. The H-2A Labor contractor failed to state who is authorized to drive the employees to and from the various work locations.

AF 33. The CO noted that the Employer must "provide all transportation between the worksite and workers living quarters, and must provide, at a minimum, the same vehicle safety standards, drivers licensure, and vehicle insurance." AF 33.

On September 8, 2009, ETA received the Employer's modified application with attachments, correcting many of the original deficiencies. AF 27-56. On September 10, 2009, ETA representative Leon Paramore e-mailed the Employer to resolve the issue of whether the Employer had sufficient registered vehicles and authorized drivers to transport the requested workers in compliance with the regulations.⁵ Mr. Paramore stated:

The employer must provide a written statement explaining how the employer is going to transport 300 workers in a vehicle that only has a capacity of 44.⁶ The

States District Court for the Middle District of North Carolina granted a preliminary injunction to enjoin the Department from temporarily substituting the new regulation. As a result of this injunction, I will apply the 2008 rule, 73 Fed. Reg. 77,110 (Dec. 18, 2008), as opposed to the substitution rule.

³ Citations to the Administrative File will be abbreviated as "AF" followed by the page number.

⁴ The CO listed nine deficiencies. Since he based his final determination on only one of these grounds, however, the other eight do not warrant discussion here.

⁵ This e-mail discusses two deficiencies, but since the final determination is based on only one of these grounds, the other one does not warrant discussion here.

⁶ It is unclear from the Appeal File as to when and how the CO obtained this information. The only place where the number of seats is indicated in the Appeal File is on the Employer FLC certificate of registration, which was submitted on September 29, 2009, after the date of this e-mail.

employer must also provide an FLC [Farm Labor Contractor] certificate or FLCE [Foreign Labor Contractor Employee] certificate that states the employer or an employee of the employer is authorized to drive. If the employer or employee is not authorized to drive, then the employer must provide a signed statement by each fixed site grower that states the fixed site growers are going to transport the workers.

AF 25. Later that day, the Employer responded by e-mail, stating:

I will transport the 300 H-2A farm workers and any American or legal resident worker in the same type of buses. The company I'm contracting with, is "Border Transport, LLC" a New Mexico registered company. I registered in Atlanta 1 bus as to get the transportation [a]uthorization; included was the CDL and FLCE registration for Driver Victor Ramirez in compliance with DOL standards and regulations. Each bus costs \$900 dollars a month for insurance plus license plates and [m]echanical inspection which Border Transport has been paying since I registered that one bus three months ago. Until I get the Certificate from DOL, Border Transport will registered [sic] the required number of buses for all the Farm Workers. This is going to happen during the time I need with USCIS to process in California, before getting the workers to the US Consulate in Ciudad Juarez to file for their H-2A visas. Border Transport is ready to hire the number of Certified drivers (which there are many waiting for us), in the area to provide Workinecction [sic] with the service.

AF 24. On September 28, 2009, Mr. Paramore e-mailed the Employer, acknowledging his response and asking the Employer to inform the Chicago National Processing Center (CNPC) if the company he is contracting with for transportation, Border Transport, LLC, "has an FLC certificate or FLCE certificate that states the employer or employee is authorized to drive." AF 19. Mr. Paramore asserted that the Employer failed to explain how the workers would be transported from the worksite to the housing location each day and informed the Employer that he must provide the necessary documentation in writing. *Id.* On September 29, 2009, the Employer faxed and e-mailed several documents to Mr. Paramore, which included: a Registration Certificate for Border Transport, LLC, from the State of New Mexico; a copy of an FLC Certificate for Jaime Campos; copies of commercial drivers' licenses and FLC certificates for Araceli Orrantia and Manuel J. Vargas; and a Federal Motor Carrier Safety Administration (FMCSA) Registration Confirmation. AF 6-18.

On October 21, 2009, the CO denied the Employer's application. AF 3-5. The CO explained that the Employer failed to clearly identify how the 300 farm workers would be transported. AF 5. The CO asserted that although the Employer has indicated that he is contracting with Border Transport, LLC, and that this company will hire certified drivers, the Employer has not provided evidence that Border Transport, LLC, is an FLC itself or that these drivers have actually been hired. *Id.* The CO acknowledged that he had received FLC certificates of registration for Araceli Orrantia and Manuel J. Vargas, but that neither had valid transportation authorizations. *Id.* The CO also asserted that neither of the FLC certificates provided proof of authorized vehicles with the capacity to transport 300 workers. *Id.* Further,

the CO contended that the copy of the FLC certificate for Mr. Vargas was not signed and thus could not be accepted. *Id.* Thus, the CO found that the Employer had failed to provide sufficient documentation to establish that he is authorized to transport workers in accordance with 20 C.F.R. § 655.106(i)-(ii). *Id.* The Employer's appeal followed.

Discussion

This case turns on whether the Employer provided the CO with sufficient documentation of compliance with the registration requirements of the Migrant and Seasonal Agricultural Worker Protection Act (the MSPA). *See* 29 U.S.C. §§ 1801 *et seq.* Regulations promulgated under the MSPA require that any employee of an FLC who engages in farm labor contracting activities—including transporting migrant or seasonal agricultural workers—must obtain an FLCE Certificate authorizing such activity from the Administrator of the Wage and Hour Division of the Department of Labor's Employment Standards Administration (the WHD). *See* 29 C.F.R. § 500.20(a), (i)-(m). The MSPA regulations also require independent contractors who perform farm labor contracting activities for FLCs to register as FLCs in their own right. *See* 29 C.F.R. § 500.20(m).

To transport the 300 workers between the Employer-provided housing and the work site, the Employer would need multiple authorized drivers and registered vehicles. The CO reasonably required the Employer to provide evidence that its contractor, Border Transport, LLC, has an FLC certificate and that its employees have FLCE certificates authorizing them to drive. Although Mr. Campos appears to have good intentions, he has not provided sufficient evidence to resolve the questions related to the authority of Border Transport, LLC, to drive and transport U.S. workers or H-2A workers in accordance with 20 C.F.R. § 655.106(b)(6)(i)-(ii). Since the H-2A regulation at 20 C.F.R. § 655.102(b)(5)(iii) requires that the Employer offer transportation between living quarters and the worksite “in accordance with applicable laws and regulations,” the Employer's failure to submit evidence of compliance with the transportation provisions of the MSPA regulations gave the CO a legally sufficient basis for denying the application.

In its request for review, the Employer asserted that as soon as he gets DOL approval, he will “contract a transportation company that will immediately register a reasonable number of buses that would be needed to transport 300 farm workers.” However, the CO cannot accept assurances regarding compliance with the FLC registration requirements. Rather, the Employer must satisfy these requirements at the time of application or, at the very least, in response to a subsequent request from the CO. Based on the record before the CO, it is clear the Employer did neither. In *Triple T Logging*, 2009-TLN-00081, slip op. at 4 (Sept. 10, 2009), the ALJ affirmed a denial of certification based on a failure to submit FLCE certificates at the time of application or in response to an RFI. As in *Triple T Logging*, the Employer failed to provide a sufficient number of FLCE certificates as well as documentation for a sufficient number of registered vehicles in order to transport the requested workers at the time of filing or, even when afforded an opportunity to do so, in response to the Notice of Deficiency. The Employer has not

demonstrated that it can provide transportation for 300 workers as required by the regulations. Accordingly,

It is hereby **ORDERED** that the Certifying Officer's decision is **AFFIRMED**.

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge