

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 01 October 2010

OALJ Case No.: 2010-TLC-00147

ETA Case No.: C-10242-24970

In the Matter of

A-1 GROWERS, 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 September 20, 2010, A-1 Growers (“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 September 24, 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 August 30, 2010, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from A-1 Growers ("the Employer") for temporary labor certification for three "Farmworkers and laborers, crop" AF 87.¹ On September 2, 2010, the CO issued a Notice of Deficiency ("NOD").² AF 53-74. Citing to 20 C.F.R. § 655.163(b), the CO stated that certification fees must be received by the CO no later than 30 calendar days after the date of certification. AF 58. Accordingly, the CO reviewed the Employer's filing history, and stated that the CO's payment records showed that the Employer had failed to resolve a certification fee from a prior application. *Id.* The CO required the Employer to resolve the delinquency or provide proof that the fees had been paid. *Id.*

Employer was required to attach an "original surety bond as required by 29 C.F.R. § 501.9." AF 33. The CO noted that the Employer had provided a copy of its bond and required the Employer to submit an original, notarized surety bond. AF 33. The CO noted that pursuant to 29 C.F.R. § 501.9 a bond cannot be cancelled with less than 45 days notice. AF 19-20. Accordingly, the CO required the Employer to provide an original bond that complied with the 45 day notice requirement. AF 20.

On September 14, 2010, the Employer responded to the NOD. AF 5-16. In its response, the Employer attached a certified rider, which noted that effective June 30, 2010, the bond's cancellation period was changed from 30 days to 45 days. AF 10.

On September 15, 2010, the CO issued a Final Determination denying the Employer's certification. AF 2-4. Citing to 20 C.F.R. § 655.132(b)(3), the CO noted that the Employer failed to submit an original surety bond. The CO also asserted that the original rider bond

¹ Citations to the 102-page Administrative File will be abbreviated "AF" followed by the page number.

² The NOD cited to eight deficiencies, however only one will be addressed on appeal.

submitted by the Employer was not “acceptable” because it was not an original surety bond. The CO denied the Employer’s application, and the Employer’s appeal followed.

Discussion

An H-2A employer must provide “proof of its ability to discharge financial obligations under the H-2A program by including with the *Application for Temporary Employment Certification* the original surety bond as required by 29 CFR 501.9. The bond document must clearly identify the issuer, the name, address, phone number, and contact person for the surety, and provide the amount of the bond (as calculated pursuant to 29 CFR 501.9) and any identifying designation used by the surety for the bond.” 20 C.F.R. § 655.132(b)(3).

The Employer argued in its appeal that it has submitted a “certified rider.” The Employer also asserted that the “Rider is a legal and binding part of the Surety Bond.” The regulation is specific that an original bond must be submitted for the application for temporary employment certification. It is undisputed that the Employer failed to submit an original surety bond. Whether the Employer’s argument that the certified rider can replace the original surety bond requirement given the legal connection between the two documents is also not a valid defense for failing to present an original surety bond in the present case because the certified rider submitted to the CNPC was not signed by the Employer, and therefore, is not a legally enforceable amendment to the original bond. Because the Employer failed to submit an original surety bond, 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