

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 01 October 2010

OALJ Case No.: 2010-TLC-00150

ETA Case No.: C-10239-24957

In the Matter of

JOSE L. BARCO,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER

On September 21, 2010, Jose Barco (“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 27, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from Jose Barco (“the Employer”) for

temporary labor certification for 40 “Farmworkers and laborers, crop” AF 41.¹ On September 2, 2010, the CO issued a Notice of Deficiency (“NOD”).² AF 23-27. Citing to 20 C.F.R. § 655.132(b)(3), the CO stated that the Employer was required to attach “a surety bond with the Employer’s address, telephone number and contact person.” AF 25. The CO also required the Employer to submit an original surety bond that would “remain in force for a period of no less than 2 years from the date on which labor certification expires.” *Id.*

On September 13, 2010, the Employer responded to the NOD. AF 6-22. In its response, the Employer attached a rider, which amended the original surety bond by including the Employer’s address. AF 15.

On September 14, 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 that contained the surety’s contact information³ and that remained in force for two years after the date of need. 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).

¹ Citations to the 69-page Administrative File will be abbreviated “AF” followed by the page number.

² The NOD cited to six deficiencies, but only one will be addressed on appeal.

³ The Employer included a Power of Attorney for the surety, which contained the surety’s contact information. The Employer argued in its Request for Review that the Power of Attorney was “legal and binding” and satisfied the regulatory requirement because it contained the correct information.

The Employer indicated in its request for review that it was unsure of the requirements for the surety bond. The Employer's confusion was most likely compounded by the CO's requirement in the NOD, which incorrectly required the Employer to include its own information on the bond rather than the surety's.⁴ The CO argued in its brief that even though he gave the Employer incorrect information, the CO quoted the regulations and the Employer had sufficient notice of what should have been included in the surety bond. However, the NOD was specific that the "**Modification Required**" by the CO was a surety bond that included the *Employer's* information, not the surety's. (emphasis in original). It is fundamentally unfair to notify the Employer of a required modification, and then deny the application because the Employer's modification was based on the incorrect information from the CO.⁵ Accordingly, I will remand the case to the CO. Upon remand, the CO should issue a second NOD with the correct "modification required" before making a Final Determination.

Order

Accordingly, it is hereby **ORDERED** that the decision of the Certifying Officer is **REMANDED** for further proceedings consistent with this decision.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

⁴ In its request for review, the Employer provided email correspondence between the CO and the Employer. In the emails, the Employer requested a "bond form" in order to ensure that the surety bond had the appropriate information. The CO responded to the Employer's request that a bond form was not available, and the surety should provide the information however it wishes. The Employer noted that it had subsequently received a "bond form" provided to another processor, and as a result, the Employer was getting a new bond based on the "bond form."

⁵ It is clear that the regulations require that the Employer submit an original bond that includes the surety's contact information, including the phone number. The bond must also remain in effect for two years following the Employer's end date.