



Issue Date: 19 November 2010

OALJ Case No.: 2011-TLC-00044

ETA Case No.: C-10291-25266

In the Matter of

FLATWOODS HARVESTING,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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

DECISION AND ORDER

On November 8, 2010, Flatwoods Harvesting (“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 November 12, 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 October 18, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from Flatwoods Harvesting (“the Employer”) for temporary labor certification for fifteen (15) “Farmworkers.” AF 92-100.¹ The Employer stated that it had a seasonal temporary need for the farm workers from December 1, 2010 to June

¹ Citations to the 114-page Administrative File will be abbreviated “AF” followed by the page number.

30, 2011. AF 92. On October 22, 2010, the CO issued a Notice of Deficiency (“NOD”), stating that because the Employer is an H-2A labor contractor, it must provide an original surety bond document as required by 20 C.F.R. § 655.132(b)(3) and 29 C.F.R. § 501.9.² AF 27. Specifically, the CO requested that the Employer provide an original surety bond which clearly identifies the issuer, the name, address, phone number, and contact person for the surety, the amount of the bond, and any identifying designation utilized by the surety for the bond. AF 27. Additionally, the CO notified the Employer that the surety bond must specify that the bond will remain in force for a period of no less than 2 years from the date on which labor certification expires and may not be canceled or terminated unless 45 days notice is provided by the surety in writing to the Wage & Hour Administrator. AF 27.

On October 28, 2010, the Employer responded to the NOD and submitted the original Continuation Certificate of the surety bond purchased last year in the amount of \$5,000, noting that the original surety bond was submitted with the Employer’s H-2A application from the previous year. AF 12, 21-23. The Employer also noted that although its bond issuer, International Fidelity Insurance Company, specified a 30 day cancellation notice rather than a 45 day cancellation notice, that this exact surety bond was accepted by the CO last year. AF 12.

On November 1, 2010, the CO denied temporary labor certification because the Employer could not provide proof of its ability to meet its financial obligation given that the bond allows the surety to cancel or terminate the bond with 30 days notice, rather than the 45 days required by the regulations. AF 9-11. The Employer’s appeal followed the CO’s denial.

Discussion

Twenty C.F.R. § 655.132(b)(3) requires an H-2A employer to provide the CO, among other documentation:

(3) 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.

² Additionally, the CO found three other deficiencies not at issue on appeal. AF 26-27.

Further, the applicable regulations provide that the surety bond may not be canceled or terminated unless 45 days notice is provided by the surety in writing to the Wage and Hour Division Administrator. 29 C.F.R. § 501.9(d).

In this case, the Employer's surety bond allows the surety to cancel the bond with 30 days notice, a direct contradiction of the requirements at 29 C.F.R. § 501.9(d). The Employer's argument that the CO has accepted its bond before is not persuasive. Similarly, the Employer's contention that it has no control over the terms of the surety bond because the issuer dictates the terms of the bond does not excuse the Employer's failure to comply with the explicit language of the regulations. The employer bears the burden of proving that it is entitled to labor certification, and here, the Employer has failed to meet that burden because it has not submitted proof of its ability to discharge financial obligations under the H-2A program per the requirements at 20 C.F.R. § 655.132(b)(3) and 29 C.F.R. § 501.9(d). Therefore, 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