

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 November 2010

OALJ Case No.: 2011-TLC-00023

ETA Case No.: C-10263-25086

In the Matter of

JBO HARVESTING, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: WILLIAM S. COLWELL
Associate Chief Administrative Law Judge

ORDER OF DISMISSAL

On October 20, 2010, JBO Harvesting, Inc. (“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 October 25, 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. 20 C.F.R. § 655.115(a).

Statement of the Case

On September 20, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor certification. AF 60-68.¹ On September 27, 2010, the CO issued a Notice of Deficiency (“NOD”), citing seven separate deficiencies with the Employer’s application. AF 4-9. The CO

¹ Citations to the 121 page Administrative File will be abbreviated as “AF” followed by the page number.

notified the Employer that pursuant to the regulations, the Employer had five business days to submit a modified application to resolve the deficiencies listed in the NOD. AF 4. Similarly, the CO notified the Employer that the regulations allow the Employer to request an expedited administrative review or de novo hearing before an Administrative Law Judge, and that such request must be filed within five business days from the date of receipt of the NOD. AF 5. Additionally, the CO notified the Employer that the application would be deemed abandoned if the employer does not submit a modified application within twelve calendar days after the Notice of Deficiency was issued. AF 4.

On October 18, 2010, the CO denied the Employer's application because the Employer did not submit a modified application within twelve calendar days after the NOD was issued and because the Employer did not request an expedited administrative appeal or de novo hearing. AF 3. The CO informed the Employer that the denial was final, and that the Department of Labor would not consider the application any further. AF 3.

On October 20, 2010, the Employer sent an email to the CO stating that he did not send a modified application within the allotted time because he had not found an insurance company that would give him a workers' compensation policy, but that he had since obtained one. The Employer requested an administrative appeal with an ALJ. AF 1, 2. The CO forwarded the appeal file to BALCA on October 25, 2010, and the CO filed a brief on October 28, 2010. The CO contends that this matter should be dismissed because the Employer's request for a hearing is not timely.

Discussion

The H-2A regulations provide that an employer may appeal a Notice of Deficiency by timely requesting an expedited administrative review or de novo hearing before an ALJ. 20 C.F.R. § 655.141(c). Additionally, the regulations require that the Notice of Deficiency inform an employer that in order to obtain an administrative review or a de novo hearing, the employer must file its written request within five business days of the receipt of the Notice of Deficiency. 20 C.F.R. § 655.141(b)(4). Further, the regulations require that the Notice of Deficiency notify the employer that failure to request an appeal or comply with the requirements to file a modified application will result in a final denial of labor certification that cannot be appealed. 20 C.F.R. § 655.141(b)(5).

In this case, the Employer did not file a modified application, and did not file a timely request for administrative review. The Notice of Deficiency is dated September 27, 2010, and the Employer did not request administrative review until October 20, 2010, two days after the CO issued a final denial. The CO provided sufficient notice to the Employer of the consequences of a failure to timely file a modified application or a timely appeal. The Employer filed its request for administrative review twenty-three days after the NOD was issued. Therefore, the Employer's request for review is untimely, and the CO's denial of certification is final.

ORDER

Based on the foregoing, it is hereby ordered that this matter is DISMISSED.

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge