



Issue Date: 07 July 2011

OALJ Case No.: 2011-TLC-00435
Case No.: C-11130-29266

In the Matter of:
PRAIRIE STATE HARVESTING, L.L.C.,
Employer

Certifying Officer: **William Carlson**
Chicago National Processing Center

Appearances: **Kevin Opp**
Aberdeen, South Dakota
For the Employer

Harry Sheinfeld, Counsel for Litigation
Office of the Solicitor
For the Solicitor

Before: **Patrick Rosenow**
Administrative Law Judge

DECISION AND ORDER AFFIRMING
DENIAL OF CERTIFICATION

PROCEDURAL STATUS

This matter arises under the provisions of the Temporary Labor Certification provisions of the Immigration and Nationality Act (the Act).¹ It involves requests by Employer, Prairie State Harvesting, L.L.C., for administrative reviews of decisions by Respondent United States Department of Labor Office of Foreign Labor Certification.

¹ 8 U.S.C. §§1101(a)(15)(H)(ii)(a); 1188(c).

In cases of this nature, the administrative law judge has five working days after receiving the file to “review the record for legal sufficiency” and to issue a decision.

BACKGROUND

On 10 May 11, Respondent received Employer’s request for temporary labor certification under the H-2A² for five Agricultural Equipment Operators from 20 Jun 11 through 1 Dec 11. On 24 Jun 11, Employer’s application was denied because proof of the surety bond was not provided with the application. On 29 Jun 11, Employer filed a request for administrative review, stating that it had attempted to obtain an original surety bond, but was having difficulty securing the bond in a timely manner because of the suddenness of the notice of change in policy.

On 5 Jul 11, the case was assigned to me and on 6 Jul 11, the parties participated in a teleconference where Employer reiterated its desire for administrative review. After a brief discussion regarding the positions of the parties and after reminding them of the responsibilities and limitations of the Administrative Law Judge (“ALJ”) in administrative review, I agreed to expedite the issuance of a decision.

POSITIONS OF THE PARTIES

The positions of the parties are straight forward. Employer argues that the CO’s sudden adherence to regulations requiring applications to include a security bond was inequitable to late harvesting operations such as theirs and made it impossible to timely comply with the regulations. The CO counters that it is merely enforcing the regulations.

² 20 C.F.R. § 655.9.

DISCUSSION

Neither party is disputing the existence of the regulation requiring a bond, which reads in pertinent part:

If an H-2ALC intends to file an Application for Temporary Employment Certification, the H-2ALC must meet all of the requirements of the definition of employer in Sec. 655.103(b), and comply with all the assurances, guarantees, and other requirements contained in this part.³

An H-2ALC must include in or with its Application for Temporary Employment Certification. . . (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.⁴

Neither is either party alleging that there was no notice of the new requirement. On 25 Apr 11, the CO sent an email informing Employer of a recent change in policy that required all H2ALCs to provide with their application proof of its ability to discharge financial obligations in the form of a surety bond.

Employer made an argument that was exclusively equitable in nature and never suggested that the regulations did not apply or were not being followed. It argued instead that the *timing* of CO's decision to begin adhering to the regulation was unfair and made it impossible for some harvesters to comply.

While it is understandable that the change in enforcement policy would have a chaotic effect in an already tight harvesting cycle, the CO was merely complying with regulations. The fact that there was a delay in requiring adherence may make the enforcement seem inequitable, but equity arguments are not within the purview of the ALJ and are not properly adjudicated in this forum. My duty is to determine whether the CO has acted according to the regulations. I find that it has.

³ 20 C.F.R. § 655.132.

⁴ 20 C.F.R. § 655.132(b)(3).

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel:

A

PATRICK ROSENOW
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.