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Office of Administrative Law Judges
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Issue Date: 07 June 2011

OALJ Case No.: 2011-TLC-00409

ETA Case No.: C-11112-29089

In the Matter of

SCOTT AVIATION, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **ALAN L. BERGSTROM**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

On May 19, 2011 Scott Aviation, 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. § 655.171. On June 1, 2011, 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 business days after receiving the file to issue a decision on the basis of the written record after due consideration of any written submissions which may not include new evidence. 20 C.F.R. § 655.171(a). Briefs from both parties were filed on June 6, 2011 and considered by this Administrative Law Judge.

STATEMENT OF THE CASE

On April 22, 2011, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from the Employer for temporary labor certification for two crop dusters. AF at 63-71.¹

On April 29, 2011, the CO issued a Notice of Deficiency ("NOD"), finding that the Employer's application failed to meet the criteria for acceptance for nine reasons. AF at 50-56. On May 6, 2011 the Employer responded to the Notice of Deficiency curing four of the stated deficiencies. AF at 21-49. On May 12, 2011 the CO denied temporary labor certification on five grounds. The reasons for denial included: the Employer failed to provide a list of fixed work sites, failed to include work contracts for each fixed work site, failed to clarify ownership of each of the fixed worksites, failed to include a copy of the surety bond, and failed to provide proof of Employer's Farm Labor Contractor Certificate of Registration ("FLC Certificate). AF at 17-20.

On May 19, 2011, the Employer appealed the denial. The Employer argued that no other fixed worksite locations were involved in crop dusting as each of the planes leaves Employer's location in Fort Morgan, Colorado every morning and returns each night before dust, never landing at a different location. Additionally, Employer argued the nature of crop dusting is as-needed and therefore work contracts are not typically part of crop dusting business. The Employer also explained that the delay in receiving a FLC Certification was due to a delay in processing by the DOL in Atlanta and not by the Employer's actions. Finally, the Employer submitted a copy of their surety brief along with their request for appeal. AF at 1-14.

DISCUSSION

Under the implementing regulations a fixed-site employer is "any person engaged in agriculture who meets the definition of employer . . . who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery or other fixed-site location where agricultural activities are performed." 20 C.F.R § 655.103. In this case the Employer does not

¹ Citations to the 89-page Administrative File will be abbreviated "AF" followed by the page number.

operate a farm or other fixed-site location, but rather operates a crop dusting business to service other farms in the area. Therefore, Employer does not meet the regulatory definition of fixed-site employer and is therefore an H-2A Labor Contractor (“H-2ALC”). H-2ALC is defined as “any person who meets the definition of employer under this subpart and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association.” *Id.* H-2ALC organizations applying for temporary labor certification have additional filing requirements in the regulations at 20 C.F.R. § 655.132. Included in these are the requirements for a surety bond and FLC Certificate to be included with the application. *Id.*

20 C.F.R § 655.132(b)(3) requires H-2ALC applicants to include “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 C.F.R. § 501.9” in their application. Along with their response to the Notice of Deficiency the Employer included a statement that they were seeking a surety bond. AF at 36. However, this mere statement is not sufficient to comply with the regulatory requirements. The Employer did not submit proof of the surety bond until it was enclosed with their request for review. AF at 12. In administrative review the ALJ is not permitted to consider any new or otherwise additional evidence not before the CO when making his determination. 20 C.F.R. § 655.171(a). Since the copy of the surety bond included in the request for review was never before the CO it cannot be considered in this administrative review. Therefore the Employer failed to properly include proof of a surety bond in their application.

The requirements at 20 C.F.R. § 655.132(b)(2) also require that H-2ALC applicants include a copy of their “Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certification of Registration.” The Employer failed to include a copy of their FLC certification in their original application. In their response to the Notice of Deficiency the Employer indicated they applied for their FLC certification on April 21, 2011 and have since received no response from the Atlanta Wage and Hour Division of the Department of Labor. AF at 24. This explanation, however, does not excuse the Employer from their responsibility to include the FLC Certification in their original application. Therefore the Employer failed to properly include the FLC Certification required under 20 C.F.R. § 655.132(b)(2).

In this case the Employer failed to include both the proof of a surety bond as required by 20 C.F.R. § 655.132(b)(3) and the FLC certification as required by § 655.132(b)(2). Therefore the CO's denial of the Employer's application for temporary labor certification was proper.²

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's denial determination is **AFFIRMED**.

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ALAN L. BERGSTROM
Administrative Law Judge

ALB/AMJ/jcb
Newport News, Virginia

² Based on the foregoing, the issue of work contracts for each fixed-site location is moot. It is noted that service contracts with fixed-site locations which outline specific time frames and locations for sporadic and seasonal agricultural services have been considered in support of similar applications.