



Issue Date: 11 February 2011

OALJ Case No.: 2011-TLC-00273
ETA Case No.: C-11014-26747

In the Matter of

VIRGINIA AGRICULTURAL GROWERS ASSOCIATION, INC.,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

ORDER OF REMAND

BACKGROUND

On Friday, February 4, 2011, the Certifying Officer (“CO”) issued a *Notice of Acceptance* (“NOA”) to the Virginia Agricultural Growers Association, Inc. (“the Employer”).¹ The NOA required the Employer to file its recruitment report with the CO by Sunday, February 6, 2011. The Employer received the Employer’s NOA on Monday, February 7, 2011 at 3:15 p.m., and faxed in its recruitment report on that day and overnighted the recruitment report for delivery to the CO.² On Monday, February 7, 2011, the CO denied the Employer’s application for failure to file its recruitment report by Sunday, February 6, 2011. The Employer received notice of the denial on February 9, 2011.

On February 9, 2011, the Employer’s attorney sent an email to ETA and the Solicitor’s Office with the subject line: “ETA requirement to respond by Sunday, February 6!!!!—please

¹ In referencing the procedural history of this case, I am unable to cite to the administrative file because it has not yet been received by this Office. Instead, I rely on the documents submitted with the Employer’s request for a de novo hearing.

² The USPS Track & Confirm receipt shows that an attempted delivery was made at 9:47 a.m. on Tuesday, February 8, 2011, but that no authorized recipient was available to sign for the package.

fix the problem so the Virginia Agricultural Growers Association, Inc. is not required to file a notice of a de novo hearing C-11014-26747 2-9-2011.” The Employer’s attorney then proceeded to explain why the denial was an error.

On February 10, 2011, the Chicago National Processing Center (CNPC) responded to the Employer’s attorney’s email, stating:

The Chicago National Processing Center is unable to issue a redetermination on the Final Determination issued on the Virginia Agricultural Growers Association, Inc. application until directed to do so by an Administrative Law Judge. It is suggested that the recruitment report be provided as part of the Appeal request and every effort will be made to remand the case back to the Center for redetermination.

On February 11, 2011, the Employer filed a request for a de novo hearing in the above-captioned temporary alien labor certification matter. On February 11, 2011, the Office of Administrative Law Judges (OALJ) received notice that the CO has agreed to remand the Employer’s application for further processing and requested that the remand could be issued today. Both the Employer and the CO have requested expedited processing of the appeal and remand request. By expedited review, the parties have made it clear that they would like the motion for remand to be granted today.

DISCUSSION

I will grant the parties’ motion for expedited review and approve a remand. However, it unclear why this matter needed the attention of an administrative law judge in the first place. The CNPC’s February 10, 2011 email to the Employer acknowledged that CNPC would remand this case, but that it would be “unable to issue a redetermination on the Final Determination issued on the Virginia Agricultural Growers Association, Inc. application until directed to do so by an Administrative Law Judge....” But why is this so? In *Coastal Ventures Management, LLC*, 2011-TLN-7 (Feb. 8, 2011), a case arising under the H2B regulations, I recently noted “that the CO’s position that he can only consider the substance of a motion for reconsideration after a request for BALCA review has been filed, and then ask for a remand if the CO determines that

the grounds for reconsideration of the denial are found to be meritorious, is not compelled by the statute or regulations, or any other rule of law of which I am aware. Rather, both BALCA and ARB caselaw indicate that a CO has full authority to entertain motions for reconsideration at the time. *Coastal Ventures*, slip op. at 10 (footnote omitted). The same is true of the H2A regulations. There is nothing in the text of the Immigration and Nationality Act, the regulations, or any other rule of law of which I am aware that requires a party to file an appeal to an ALJ as a prerequisite the CO correcting his own error, or finding that the employer had remedied some other error relating to a temporary alien labor certification application. In fact, it is a patently inefficient and unnecessarily expensive way to proceed. I implore the Office of Foreign Labor Certification (“OFLC”) to review this policy of the CNPC and consider the costs it imposes on employers, the administrative review process, and the public coffers. At the very least, the OFLC should be prepared to explain why the procedure is required if the issue arises in future litigation before OALJ. In the instant case, the Employer requested reconsideration of the denial specifically so that it would not have to file an appeal. That it had to file a request for administrative review to have the merits of its position considered by the CO seems to reflect a breakdown in common sense.

Finally, it should be noted that although by their nature H2A appeals dispense with some of the formalities of other types of cases adjudicated by Department of Labor administrative law judges, OALJ proceedings are governed by H2A regulations themselves and the Rules of Practice and Procedure found at 29 C.F.R. Part 18. The procedure and standards for expedited proceedings before OALJ are found at 20 C.F.R. § 18.42. No party has explained what irreparable harm would have resulted if the appeal in this matter had not been docketed and remanded in the same day.³ One would be hard pressed to find a more expedited appeal

³ The only explanation received by OALJ for the need for immediate action on remand was in the text of an email in which the Employer submitted its “Request for Emergency Hearing De Novo.” The Employer argues that the CNPC’s position that ETA would not be able to issue a redetermination on the Employer’s application until directed to do so by an ALJ “makes involvement and immediate action today by an Administrative Law Judge in this matter critically important. Our experience is that with delay occasioned by the preparation of the official administrative record in Chicago, many critical days will be lost before that record is even in the hands of the Office of Administrative Law Judges. That concern is heightened because yesterday, as in other recent efforts by my office and me personally, we were unable to provide notice of our Request for De Novo hearing to the Chicago National Processing Center via telefax although two separate fax transmissions to the Office of Administrative Law Judges went through.” Although this argument explains why the Employer needed to take an appeal, it does not establish

procedure administrative review than the H2A regulations already provide. OALJ invariably processes unopposed motions for remand in H2A appeals without particular delay. Moreover, OALJ has a heavy docket of appeals on other matters whose cases are just as important to the parties in those cases.

OALJ has very limited resources. To be clear, H2A appeals are already taking priority over every other type of case before OALJ, and a request for same-day-service on an appeal is nothing short of extraordinary.

In light of the foregoing, it is hereby **ORDERED** that this matter is **REMANDED**.

For the Board:

A

WILLIAM S. COLWELL

Associate Chief Administrative Law Judge

irreparable harm if OALJ failed to docket the appeal and issue a remand on the same day. Nor does it necessarily justify advancing this matter over other matters pending before OALJ.