

**U.S. Department of Labor**

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**Issue Date: 04 February 2011**

**OALJ Case No.: 2011-TLC-00173**

**ETA Case No.: C-10363-26126**

*In the Matter of*

**WILLARD J. HARMON**  
**D/B/A**  
**BILL HARMON FARMS,**  
*Employer*

Certifying Officer: William L. Carlson  
Chicago Processing Center

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

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

On January 21, 2011, Willard J. Harmon d/b/a Bill Harmon Farms (“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(a). On January 28, 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. 20 C.F.R. § 655.171(a).

**STATEMENT OF THE CASE**

On December 29, 2010, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor

certification for twenty (20) agricultural equipment operators. AF 85-93.<sup>1</sup> With its application, the Employer submitted a copy of the job order (ETA Form 790) that it submitted to the State Workforce Agency (“SWA”) serving the area of intended employment. AF 94-97. In describing the transportation arrangements in Item 17 on the ETA Form 790, the Employer stated:

Employer provides transportation while employee is employed. Employer will use bus service to get employees to work location if needed and the ones who drive themselves they will be reimbursed for travel expenses to get to the work site. In case of emergencies workers will call Bill Harmon @ 620-275-9597 for instructions. The employer will reimburse the workers for transportation subsistence expenses \$9.90 per day to \$39.00 per day.

AF 96. On January 5, 2011, the CO issued a *Notice of Deficiency* (“NOD”), outlining nine reasons that the Employer’s application could not be accepted for consideration. AF 68-74. Among these deficiencies, the CO found that Item 17 of the Employer’s ETA Form 790 failed to address the employees’ outbound transportation from the place of employment. AF 70. The CO required the Employer to modify the ETA Form 790 attachment to guarantee return transportation back to the place from which the worker departed upon termination without cause or completion of the contract period, as required by 20 C.F.R. § 655.122(h)(2). AF 70-71.

The Employer responded to the NOD on January 11, 2011. AF 51-67. With respect to Item 17 on the ETA Form 790, the Employer submitted a modification that provided:

Employer provides transportation while employee is employed. Employer will use bus service to get employees to place of employment if needed and the ones who drive themselves they will be reimbursed for travel expenses to get to the work site. In case of emergencies workers will call Bill Harmon @ 620-275-9597 for instructions. The employer will reimburse the workers for transportation subsistence expenses \$10.64 per day to \$46.00 per day.”

AF 63. Additionally, the Employer submitted an attachment to the ETA Form 790 that stated:

Transportation for employee to get to and from place of employment will be provided by employer. Employer will use bus services if needed and those who drive themselves will be reimbursed for all travel expenses which include but are not limited to food, fuel, lodging and bus services. In case of an emergency worker should contact Bill Harmon @ 620-275-9597 for further instructions. If employee is terminated employer provides transportation and daily living

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<sup>1</sup> Citations to the 104 page Administrative File will be abbreviated “AF” followed by the page number.

expenses from place of employment to place in which the worker departed to work for employer.

AF 66. On January 13, 2011, the CO denied the Employer's application for temporary labor certification for four reasons. AF 46-50. One of the grounds for denial was the Employer's failure to include a description of the outbound transportation that the Employer would provide to the workers that complete the contract period or that are displaced as a result of the Employer's compliance with the 50 percent rule. AF 48-49.

The Employer requested expedited administrative review of the denial. On appeal, the Employer submits a corrected ETA Form 790 containing the modifications requested by the CO's NOD and requests that I remand this case to the CO.

### **DISCUSSION**

When an employer requests expedited administrative review, the ALJ's scope of review is limited to the record upon which the CO based his denial. 20 C.F.R. § 655.171(a). Therefore, I am not permitted to consider the modified ETA Form 790 attachment that the Employer has submitted on appeal.

Prior to filing an application for temporary labor certification under the H-2A program, an employer must submit a job order (Form ETA-790) to the SWA serving the area of intended employment, identifying it as a job order to be placed in connection with a future application for temporary employment certification for H-2A workers. 20 C.F.R. § 655.121(a). The job order must contain the job offer content required by 20 C.F.R. § 655.122. 20 C.F.R. § 655.121(a)(3). The regulations require that an employer utilizing the H-2A temporary labor certification program guarantee that it will provide or pay for the H-2A worker's transportation back to the place from which he or she departed in order to work for the employer. Specifically, 20 C.F.R. § 655.122(h)(2) provides:

*Transportation from place of employment.* If the worker completes the work contract period, or if the employee is terminated without cause, and the worker has no immediate subsequent H-2A employment, the employer must provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer who has not agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer must

provide or pay for such expenses. If the worker has contracted with a subsequent employer who has agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses. The employer is not relieved of its obligation to provide or pay for return transportation and subsistence if an H-2A worker is displaced as a result of the employer's compliance with the 50 percent rule as described in §655.135(d) of this subpart with respect to the referrals made after the employers date of need.

In this case, the Employer's job order did not contain the required information regarding the return transportation, and the Employer explicitly failed to comply with the NOD request to modify the ETA Form 790 to include the above information regarding the return transportation for H-2A workers. Therefore, the CO properly denied temporary labor certification, and because I cannot consider the newly modified ETA Form 790 attachment on appeal, the Employer has not cured this deficiency. Based on the foregoing, the CO's denial is affirmed.

### **ORDER**

Accordingly, 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