

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 05 March 2014**

OALJ Case No.: **2014-TLC-00027**

ETA Case No.: **H-300-13343-495681**

*In the Matter of:*

**ANNA ROSA PEREZ-QUINTINO,**  
Employer.

Appearances:

Anna Rosa Perez-Quintino, Lyons, GA  
For the *pro se* Employer

Jonathan R. Hammer, Esq., Office of the Solicitor, Washington, D.C.  
For the Certifying Officer, U.S. Department of Labor, Chicago, IL

Before: Pamela J. Lakes  
Administrative Law Judge

**ORDER OF REMAND**

This matter arises under the temporary agricultural employment provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii) and 1184(c)(1), and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B. On January 15, 2014, Anna Rosa Perez-Quintino (“Employer”) filed a request for a review of the Certifying Officer’s denial of her H-2A application pursuant to 20 C.F.R. §655.171(a). There is a dispute between the Certifying Officer (“CO”) and the Employer as to whether the Employer timely responded to the Notice of Deficiency. For the purpose of this Order, I will accept Employer’s assertion that she timely responded on December 17, 2013.<sup>1</sup> Even if the response submitted by the Employer is accepted as timely, this application still fails. Although ordinarily the denial of the application would therefore be affirmed, I am instead remanding this matter for further processing in view of

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<sup>1</sup> The CO apparently misfiled a communication by the Employer that transmitted her previous response to the NOF and therefore had to transmit a Supplemental Appeal/Administrative File containing the additional documentation along with the original Appeal/Administrative File. The CO’s use of emails in addition to mailed documents for filing purposes, and the CO’s failure to incorporate emailed documents in the original Appeal File, suggest that the Employer timely responded, as stated.

the delays that have occurred in the appeal process and potential prejudice to Employer resulting from the delays.

## STATEMENT OF THE CASE/FACTUAL BACKGROUND

On December 9, 2013, Employer filed an application for temporary labor certification for seventy (70) vegetable and hand harvester workers with the Department of Labor's Employment and Training Administration ("ETA"); the application was signed on December 5, 2013. (AF 28-63).<sup>2</sup> In her application for labor certification, Employer indicated that she is a farmer of plants, and cultivates crops in the growing season in Georgia. (AF 28). Employer indicated that the farming work is done around the same time every year. *Id.* Employer designated the positions to be filled as "Vegetables and Hand Harvester Workers" with an O\*NET<sup>3</sup> code of 45-2092.02. *Id.* The job duties included harvesting, gathering, counting, and packaging carrots, lettuce, cabbage, greens, and onions; additional duties included field and camp sanitation, maintenance, loading, and unloading. (AF 30). *Id.* The job description also noted that sixty days of verifiable farm work experience was required. (AF 30-31). On its ETA Form 9142A, Employer listed the work site location as JR Farms Produce in Register, Georgia. (AF 31). Attached to Employer's ETA was a letter submitted by Mr. Shannon, president of JR Farms Produce. (AF 56). The letter indicated Mr. Shannon's intent to employ workers through a contract with Employer, from January 20, 2014 until April 15, 2014. *Id.* Additionally, Employer submitted a copy of her Farm Labor Contractor Certificate of Registration. (AF 59).

On December 16, 2013, the Certifying Officer ("CO") issued a Notice of Deficiency ("NOD"), finding four deficiencies or groups of deficiencies. (AF 8-14).

The first deficiency involved the date the Chicago National Processing Center ("CNPC") received Employer's application, which was found to be untimely and without a statement requesting a waiver of the required time period for filing.<sup>4</sup> *Id.* Under 20 C.F.R. § 655.130(b), a completed Application for Temporary Employment Certification ("application") must be filed no less than forty-five (45) calendar days before the employer's date of need. 20 C.F.R. § 655.130(b). Employer was requested to provide a statement justifying good and substantial cause for a waiver to the time filling period, or change the start of need to January 23, 2014, or later, as required under 20 C.F.R. §§ 655. 121(a)(1), 130(b), and 134(a). In her December 17, 2013 response, Employer failed to address the issue of timeliness. (SAF 2-10).

In the second deficiency, the CO found Employer's application to be incomplete for six different reasons (subparts A through F), all of which are technical or clerical in nature.<sup>5</sup> (AF 10-12). In subpart (A), the CO cited Employer failed to complete the business address in section C items 7 through 8, 12 through 13 and item 17 of the ETA Form 9142-A. *Id.* Employer

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<sup>2</sup> Citations to the Appeal File or Administrative File will appear as "AF" and citations to the Supplemental Appeal or Administrative File will appear as "SAF" followed by the pertinent page number.

<sup>3</sup> The O\*NET is a database containing information on hundreds of standardized and occupation-specific descriptions. <http://www.onetonline.org/help/online/zones>.

<sup>4</sup> CNPC received Employer's application on December 9, 2013, with a start date of need on January 20, 2014, 42 days later. (AF 10).

<sup>5</sup> The CO listed three deficiencies with subparts. For the second deficiency, the subparts were listed as (A) through (F), in the NOD. (AF 10-12).

submitted a corrected application in her December 17, 2013 response, with the above listed sections completed. For subpart (B), Employer had listed “Lyons” as a state. *Id.* Employer corrected this error, and listed Lyons as the city and Georgia as the state (a fact that was made clear in another entry on the same page of the original application). Subpart (C) involved Section E, item 1 of the ETA. Employer indicated in her application that she would not be represented by an attorney or agent; however, Employer failed to indicate “no” in response to question E, item 1, which inquired about representation. *Id.* Employer checked the “no” box in her corrected application. Subpart (D) involved the Employer’s failure to include the full worksite address in item 2 of the ETA Form 790. *Id.* It appears that on the originally submitted ETA Form 790, the worksite address was cut off by a hole-puncher; however, the address was included in section F(c) of the application, in attachments to the application, and again on the re-submitted corrected application. (AF – 31 37, 54, 56). Subpart (E) involved the fact that Employer indicated that two months experience was required for the job, in section F(a) item 5; however, she failed to include this requirement in section F(b) item 4 of the ETA Form 9142-A. *Id.* Again, Employer corrected this error in her re-submitted December 17, 2013 application. (SAF 2-7)/ In subpart (F), the CO indicated that Employer failed to complete section H, item 2 through 2(b) of the ETA Form 9142-A. *Id.* Employer completed sections H items 2(a) through 2(b) in her December 17, 2013 response to the NOD, but she failed to provide the SWA job order identification number as requested under section H, item 2, instead placing “N/A” as a response. *Id.*

The third deficiency involved the ownership of the stated work location and the Employer’s obligations as a labor contractor. (AF 12). In that regard, the Employer’s identified business address and worksite address are at different locations. *Id.* The CO requested that Employer provide all required documentation and written assurances to abide by 20 C.F.R. § 655.132(b), if acting as an H-2A Labor Contractor, and the CO specified what documentation was required to be submitted. *Id.* As noted in the NOD, pursuant to DOL regulations at 20 C.F.R § 655.132(b), an H-2A Labor Contractor (“H-2ALC”) must include five items or documents in its *Application for Temporary Employment Certification*:

- (1) The name and location of each fixed site, the expected beginning and ending dates when the H-2ALC will be providing the workers, and a description of the crops and activities the workers to be performed;
- (2) A copy of Farm Labor Contractor Certificate of Registration, if required under MSPA at 29 U.S.C. 1801 et seq., identifying the specific farm labor contracting activities the H-2ALC is authorized to perform;
- (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;
- (4) Copies of the fully-executed work contracts with each fixed-site agricultural business identified under paragraph (b)(1) of this section; and
- (5) Where the fixed-site agricultural business will provide housing or transportation to the workers, proof that: (i) all housing complies with the applicable standards as set forth in § 655.122(d) and certified by the SWA; and (ii) all transportation between the worksite and the workers’ living quarters complies with all applicable Federal, State, or local laws and regulations and must provide vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR 500.105 and 500.120 to

500.128, except where workers' compensation is used to cover such transportation as described in § 655.125(h).

Documents submitted with the original application reflect that Employer is, in fact, acting as a labor contractor, even though she characterized herself as a "farmer," "president," and "owner" in the application itself. Attached to her original application and resubmitted application, Employer submitted a letter by James Shannon, president of JR Farm Produce. (AF 56). Mr. Shannon declared, in his letter, that he intends to employ Employer, as a contractor, to utilize workers for his company, and that he would be providing transportation for the workers. *Id.* Employer attached to her original application, and resubmitted, a copy of her Farm Labor Contractor Certificate of Registration. (AF 59, SF 2-10). Employer submitted her Internal Revenue Service provided Employer Verification Number, with her application. (AF 61). Employer also submitted a Short Lease agreement to provide housing for the requested seventy H-2A workers. (AF 57-58). Additionally, Employer submitted a Certificate of Liability Insurance reflecting \$500,000 coverage for workers' compensation and employers' liability, with her original application and in her response to the NOD. (AF 63). In response to the NOD, Employer stated "I would like to assure your office I will have the original surety bond before the time of need." (SAF 1-2).

The fourth and final deficiency cited by CO involved the first week wage guarantee; the CO requested that Employer provide written assurance that she will abide by the regulations set forth in 20 C.F.R. §§ 653.501(d)(2)(v)(A) and 653.501(d)(2)(v)(D). (AF 14). In her response letter, Employer declared "I would like to assure you that I will abide by the regulations set forth at 20 CFR 653.501(d)(2)(v)(A) & 20 CFR 653.501(d)(2)(v)(D)." (SAF 2-10).

In its NOD, the CO indicated that the amendments to the application must be made to the original documents by crossing out the amended item, initialing, and dating each correction. (AF 14). Employer was required to return all original documents with the modification letter. *Id.* It appears that Employer submitted new pages and did not make changes by crossing out entries in the original application. (SAF 2-7).

Employer responded to the NOD on December 17, 2013; however, the CO has not located that response, although it received Employer's followup response of January 14, 2014 (discussed below), which attached the documents. (SAF 1-10).

On January 13, 2014, the CO denied Employer's application for temporary labor certification. (AF 4-6). The CO found that Employer failed to submit a modified application, as required, within twelve (12) calendar days after the NOD was issued. (AF 5).

Employer emailed the CO on January 14, 2014, sending another copy of the documents she previously submitted. (SAF 1-10). No action was apparently taken based upon that email and attachments; however, they were transmitted to the Office of Administrative Law Judges over one month later, along with the rest of the file. Apparently, the followup from the Employer of January 14, 2014, attaching the December 17, 2013 response, was not filed in the administrative file; accordingly, when a copy of the file was finally transmitted, the CO submitted an Appeal File and a Supplemental Appeal File. (SAF 1-10).<sup>6</sup>

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<sup>6</sup> The CO has provided no explanation as to why these documents were not incorporated in the Appeal File.

Employer filed a request for review of the denial of a certification, on January 15, 2014. (AF 1). The request listed as addressees both the Chief Administrative Law Judge in Washington, D.C. and the Employment and Training Administration, Office of Foreign Labor Certification, Chicago National Training Center in Chicago, Illinois. Employer did not include any kind of address and the phone number she listed was not in service. Subsequently, Employer asked about the status of her appeal (again, providing no contact information.) No file was transmitted by the CO.<sup>7</sup>

On February 20, 2014, I issued a Notice of Assignment and Order (“Notice”), which provided the following.

Employer Anna Rosa Perez-Quintino has not provided her address, and the phone number she provided appears to be incorrect. In a followup letter requesting the status of her appeal, she provided no contact information whatsoever. This Notice is therefore being sent to her last address during prior TLC proceedings. Employer shall immediately (1) provide the undersigned and opposing counsel with current contact information, including her current address and at least one phone number and (2) advise whether she is currently represented and, if so, provide the address and telephone number of her representative.

The administrative file for the instant case has not been received yet. Counsel for the Employment and Training Administration shall immediately advise the undersigned and the Employer of the reason for the delay in providing the administrative file and shall make immediate efforts to expedite the production of the file.

As Employer did not include contact information, the Notice was sent to an address she had used on a previous application for labor certification. The Notice also indicated that, absent further clarification from the Employer, an expedited administrative review would be conducted, pursuant to 20 C.F.R. § 655.171(a)

In response to the Notice, counsel for the CO informally advised that the CO had not received the Notice of Appeal prior to the time that a copy was sent to the Solicitor’s Office from this Office. However, on February 25, 2014, counsel for the CO sent a copy of the Appeal File and Supplemental Appeal File via email to the Office of Administrative Law Judges and to the Employer. The Appeal File included an email address and a P.O. Box for Employer. Accordingly, upon receipt of the Appeal File, a copy of the Notice was sent via email to both Employer and counsel for the CO.

Pursuant to the undersigned Administrative Law Judge’s Notice of Assignment and Order, the parties were given three (3) business days, from the date of receipt of the AF, to submit any briefing in the matter, with a decision to be issued within five (5) business days; thus,

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<sup>7</sup> The regulations relating to the TLC program do not require the CO to transmit the file within any prescribed period of time. *See* 20 C.F.R. Part 655

the briefing was due on or before February 28, 2014. Counsel for the CO submitted a timely letter brief on February 28, 2014; Employer did not file any briefs in the matter.

## DISCUSSION

In order to bring non-immigrant workers to the United States to perform agricultural work, an employer must demonstrate that: 1) there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of intended employment at the time needed, and 2) the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. 20 C.F.R. § 655.103(a). The H-2 visa program was created to relieve shortages of U.S. workers in agricultural (H-2A) and non-agricultural (H-2B) industries by enabling employers to hire aliens to perform labor or services of a temporary or seasonal manner. *Florida Fruit and Vegetable Assoc.*, 1991-TLC-4 (Sept. 6, 1991).

In its December 16, 2013 NOD, the Certifying Officer identified four groups of deficiencies in need of correction, in order to process Employer's application. (AF 7-14). Inasmuch as the Employer did not correct all of these deficiencies, the CO properly denied certification.

*Timeliness/Waiver.* The first deficiency involves the application filing requirements, at 20 C.F.R. § 655.130(b), *Timeliness*: "A completed *Application for Temporary Employment Certification* must be filed no less than 45 calendar days before the employer's date of need. Under 20 C.F.R. § 655.134(a),

The CO may waive the time period for filing for employers who did not make use of temporary alien agricultural workers during the prior year's agricultural season or for any employer that has other good and substantial cause (which may include unforeseen changes in market conditions), provided that the CO has sufficient time to test the domestic labor market on an expedited basis to make the determinations required by § 655.100.

20 C.F.R. § 655.134(a). Employer failed to address her untimely application, and failed to provide the CO with the required statement to justify good and substantial cause for a waiver. Although Employer signed her application on December 5, 2013, it was stamped as filed on December 9, 2013. Based upon the requested a date of need of January 20, 2014 and the filing date of December 9, 2013, this corresponds to forty-two (42) calendar days. In its NOD the CO indicated that amendment of the need date to January 23, 2014 would suffice. Employer did not address this matter in her December 17, 2013 response. It is unclear whether Employer mailed, e-mailed, or faxed her application; had she faxed or otherwise filed her application on December 5, 2013 the date it was signed, it would have been timely. This matter could have been easily corrected by changing the start date to January 23, 2014, and Employer subsequently voiced her "desperate need" for the workers. (AF 2). Thus, while there may have been a technical violation, that is not entirely clear and it could have easily been corrected at the time. *See* 20 C.F.R. § 655.130(b) (timeliness), 20 C.F.R. §§ 655. 121(a)(1), 130(b), and 134(a) (request of waiver in emergency situation).

*Incomplete Application.* With respect to the second group of technical deficiencies, the CO indicated in its denial of certification, that Employer never submitted a modified application, within twelve (12) calendar days after the NOD was issued, as required under 20 C.F.R. § 655.142(b). (AF 5). While the NOD indicates that Employer was to make changes to the original application, I find that Employer's correction of the application by submitting additional pages was a sufficient modification to its original application. The CO retained a copy of the original application, filed on December 9, 2013, and corrected pages were submitted on December 17, 2013 and resubmitted on January 14, 2014. (AF28-AF36; SAF 1-10.) In its December 17, 2013 response to the NOD, Employer sufficiently submitted the necessary responses to cure the ETA form application deficiencies listed as 2 (A) through (E). (SAF 10-12). With respect to paragraph (F), Employer has still failed to provide her SWA job order identification number as requested under section H, item 2,

*Labor Contractor Requirements.* The third group of deficiencies involved whether Employer properly complied with the application requirements pursuant to 20 C.F.R. § 655.132(b) (H-2A Labor Contractor required documents). While Employer complied partially with the requirements of an H-2A Labor Contractor, she did not completely comply. In that regard, Employer indicated on her corrected application that she is an H-2A Labor Contractor, in accordance with Mr. Shannon's letter, and provided the required information; she submitted her Farm Labor Contractor Certificate of Registration; and she provided some information concerning housing and transportation, although the documentation was sparse. Employer however, failed to submit an original surety bond as required under 20 C.F.R. § 655.132(b)(3). Likewise, while, Employer submitted a letter from Mr. Shannon, the president of JR Farms Produce, with whom she contracted to provide workers for their worksite, she did not provide a copy of the fully-executed contract as required under 20 C.F.R. § 655.132(b)(4). The failure to produce an original surety bond and a copy of the contract are significant omissions that would warrant denial of the application.

*Assurances of Compliance.* The fourth deficiency was cured in Employer's December 17, 2013 response to the NOD. Employer provided written assurance that it would abide by the first week wage guarantee requirement and other regulations set forth in 20 C.F.R. §§ 653.501(d)(2)(v)(A) and 653.501(d)(2)(v)(D). (AF 14). In its response letter, Employer declared "I would like to assure you that I will abide by the regulations set forth at 20 CFR 653.501(d)(2)(v)(A) & 20 CFR 653.501(d)(2)(v)(D)." (SAF 2-10).

Based upon the above, there are still deficiencies in the application, and even if the Employer's December 17, 2013 response were accepted as timely, the application would still be incomplete or otherwise deficient. Accordingly, the CO properly denied certification.

In its February 28, 2014 letter brief, the CO notes that the denial premised upon failure to respond to the NOD was final, that the CO had no record of receiving Employer's December 17, 2013 response, and that Employer failed to produce the transmittal email or fax transmission when requested to do so by the CO. Further, the CO indicated to Employer that it would request a remand if the Employer could produce such evidence but that Employer failed to do so and, in the absence of such documentation, the CO could not make a determination that it was sent.

I agree with the CO that the Employer here has failed to produce evidence that she should have produced concerning her December 17, 2013 response. Further, Employer has contributed to the delays here by not providing contact information. Likewise, she did not submit any evidence or argument before me. Although the Employer has asserted a “desperate need” for the workers, her actions on this appeal have belied that fact.

Nevertheless, in view of the amount of time that has elapsed since the application was filed, and the fact that the start date for the application has passed, I find that a remand is necessary to prevent any prejudice. In that regard, Employer’s ability to simply refile in order to correct any deficiencies has been hampered by the delays in processing this appeal. As discussed more fully above, some, if not all, of the deficiencies could be corrected. A remand would give the Employer the opportunity to do so, and if Employer fails to do so, the CO may appropriately deny certification.

### **CONCLUSION**

.In view of the above, I am remanding this matter to the CO to allow the CO to address the deficiencies in the application with the Employer to see whether the existing application is subject to correction. On remand, the CO shall accept the premise that the December 17, 2013 response was timely filed and shall not deny the application on the basis that the Employer failed to respond to the NOD. However, nothing in this Order shall prevent the CO from denying the application if any deficiencies are not timely corrected.

### **ORDER**

**IT IS HEREBY ORDERED** that the instant case be, and hereby is, **REMANDED** to the CO for further processing.

PAMELA J. LAKES  
Administrative Law Judge

Washington, D.C.