



Issue Date: 17 June 2014

CASE NO.: 2014-TLC-00092

OALJ NO.: 14128-992388

IN THE MATTER OF

LOWCOUNTRY PRODUCE,
Employer

Certifying Officer: Chicago National Processing Center

Before: **PATRICK M. ROSENOW**
Administrative Law Judge

DECISION AND ORDER

This matter involves a request for certification of non-immigrant foreign workers (H-2A workers) for temporary or seasonal agricultural employment under the Immigration and Nationality Act (INA), as amended,¹ and the implementing regulations promulgated by the Department of Labor.² This Decision and Order is based on the written record, consisting of the Appeal File (AF) forwarded by the Employment and Training Administration, and the written arguments submitted by the parties. Pursuant to federal regulations at 20 C.F.R. Section 655.171(a), evidence considered was limited to that which was before the Certifying Officer (CO), with no new evidence submitted on appeal. In expedited administrative review cases, the administrative law judge has five working days after receiving the AF to issue a decision on the basis of the written record.³ The AF for this case was received on Tuesday, June 10, 2014.

BACKGROUND

On May 8, 2014, Lowcountry Produce (Employer) requested temporary labor certification for ninety “farmworkers and laborers” during the period from June 5, 2014 through July 20, 2014.⁴ On May 15, 2014, an email was sent from the Chicago National Processing Center to Employer, detailing five deficiencies in its application.⁵ One of these was that Employer failed to provide “good and substantial cause” for its request of a waiver of the time period requirement. The Notice of Deficiency (NOD) stated that Employer cited a lack of

¹ 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

² 20 C.F.R. Part 655, Subpart B.

³ 20 C.F.R. § 655.171(a).

⁴ AF 29.

⁵ AF 7-12.

workers in the area as a reason for requesting a waiver of the requirement that it file its application no less than 45 days before the date of need.⁶

Employer responded to the NOD on May 16, 2014.⁷ It argued that the reason for requesting the waiver was that it had not anticipated the extreme and unusual shortage of migrant workers this year, which qualifies as “unforeseen circumstances” and entitles it to a waiver in accordance with 20 C.F.R. Section 655.134(b).

The Chicago National Processing Center responded to Employer and reiterated that it must change its start date to be approved, as it had still not demonstrated good and substantial cause for a waiver.⁸ Employer declined and requested administrative review.

POSITIONS OF THE PARTIES

The CO’s position is that Employer’s reason for requesting a waiver does not rise to the level of “good and substantial cause.” In the NOD, the CO noted:

20 C.F.R. § 655.134(b) provides a non-exhaustive list of items which qualify as good and substantial cause. While the events listed are varied...they share the common trait of being outside the control of the employer. The employer stated that they are requesting a waiver of the required time period due to a lack of workers in the area. Lack of workers in a specific location and/or occupation, is the reason why the H-2A program was created. A lack of local workers is not a reason to wave [*sic*] the required time period.⁹

To the CO, the unavailability of U.S. workers is not a qualifying condition outside the control of an employer. Moreover, since Employer had applied for H-2A certification previously, it should have been familiar with the regulations.

Employer did not submit a brief. In its request for administrative review and response to the NOD, Employer stated that “[t]here is no way for the employer to foresee the shortage of workers when he makes the decisions to plant in the spring...It is due to the reports that the current tomato harvest [is] not being harvested because of an extreme labor shortage that prompted the employer to file an emergency application.”¹⁰ Additionally, Employer had stated in its initial waiver request,

[t]he migrant pool has significantly dried up as the current reports out of Florida are confirming that theory. There are a number of growers in Florida that have left acres of produce in the field to rot due to the severe shortage of harvesters this year. The only hope [Employer] has of getting the crop harvested is to get

⁶ AF 9.

⁷ AF 4.

⁸ AF 3.

⁹ AF 9.

¹⁰ AF 4.

certified quickly by the DOL and then transfer H2 workers that are in country from another contract.¹¹

LAW

An employer bears the burden of establishing eligibility for temporary labor certification under the H-2A program.¹² An employer seeking labor certification must file its application at least 45 days prior to its date of need.¹³ If Employer fails to do so,

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 market on an expedited basis to make the determinations required by §655.100.¹⁴

Good and substantial cause may include "the substantial loss of U.S. workers due to weather-related activities or other reasons, unforeseen events affecting the work activities to be performed, pandemic health issues, or similar conditions."¹⁵ The 45-day time frame is in place to provide the CO time to test the domestic labor market in accordance with the requirements of 20 C.F.R. § 655.100(b).¹⁶ Because the CO is in the best position to determine whether the shortened application period will allow time to test the market, the regulations give him the discretion to approve waiver requests.¹⁷

DISCUSSION

Employer does not dispute that it filed its application less than 45 days prior to the anticipated start date. It admitted that it had used H-2A workers in the past, but there was no evidence that it did so in the prior year's agricultural season.¹⁸ Nevertheless, the CO determined that Employer's reasoning for requesting a waiver was not "good and substantial cause." The regulation indicates that an unforeseen shortage of laborers may qualify as good and substantial cause, and I find the CO's explanation in the NOD unsatisfactory. The CO stated "[l]ack of local workers in a specific location and/or occupation, is the reason why the H-2A program was created. A lack of local workers is not a reason to waive the required time period."¹⁹ The regulations, however, explicitly contemplate the types of situations that may render a local workforce unavailable, and the subsequent "substantial loss of U.S. workers."²⁰

¹¹ AF 58.

¹² 20 C.F.R. § 655.161(a).

¹³ 20 C.F.R. § 130(b).

¹⁴ 20 C.F.R. § 655.134(a).

¹⁵ 20 C.F.R. § 655.134(b).

¹⁶ See *Belle Chase Farm d/b/a Ken Slyziuk Ranch*, 2010-TLC-39 (June 17, 2010).

¹⁷ See *Terra Ad Coelum*, 2010-TLC-37 (June 16, 2010).

¹⁸ AF 58; 20 C.F.R. § 655.134(a).

¹⁹ AF 9.

²⁰ 20 C.F.R. § 655.134(b).

Nevertheless, Employer did not provide any evidence that would allow the CO to find that such an event or situation had led to a surprise worker shortage. Employer simply asserted that “current reports” were indicating there would be insufficient numbers of laborers to complete the tomato harvest. It did not submit anything to indicate why this was the case, or to bolster its assertion. It did not submit any evidence of the “number of growers in Florida that have left acres of produce in the field to rot due to the severe shortage of harvesters this year.”²¹ Had Employer submitted some evidence to the CO that demonstrated both the fact of the “unforeseen changes in market conditions” and an explanation for those changes, it would likely have satisfied the regulatory requirements.²²

I find that, based on the record he had before him, the CO did not abuse his discretion. The Employer failed to offer any specific evidence of why the shortage was unforeseen. Given the CO’s mandate to test the marketplace to ensure that U.S. workers are not being displaced, he is in the best position to decide if a waiver will allow him to meet the regulatory requirements. In this case Employer did not present evidence of a good and substantial cause for such a waiver.

ORDER

Accordingly, it is **ORDERED** that the Certifying Officer’s Notice of Deficiency concerning Employer is **AFFIRMED** and the associated labor certification application is **REMANDED** for further processing.

SO ORDERED.

PATRICK M. ROSENOW
Administrative Law Judge

²¹ AF 58.

²² The regulations themselves mention weather, health, and other “unforeseen events affecting the work activities to be performed.” 20 C.F.R. § 655.134(b).