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Issue Date: 17 June 2015

OALJ Case No.: 2015-TLC-00050

ETA Case No.: H-300-15128-490123

In the Matter of:

VALENTINO LOPEZ GOMEZ,
Employer

Certifying Officer: John T. Rotterman
Chicago National Processing Center

Appearances: Tito Eli Gonzalez
Englewood, FL
Agent for Employer

Emily Toler, Esquire
Division of Employment and Training Legal Services
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.
For the Certifying Officer

BEFORE: MORRIS D. DAVIS
Administrative Law Judge

DECISION AND ORDER

This case originates under the temporary agricultural guest worker provisions of the Immigration and Nationality Act (“INA”), 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184, and 1188, and the implementing regulations set forth in 20 C.F.R. Part 655, Subpart B (collectively, the H-2A program). On May 18, 2015, Tito Eli Gonzalez, on behalf of Valentino Lopez Gomez (“Employer”), requested de novo review by an administrative law judge of the Certifying Officer’s (“CO”) decision to issue a Notice of Deficiency (“NOD”) on Employer’s H-2A Application for Temporary Employment Certification and Clearance Order. The Office of Administrative Law Judges received the request on May 20, 2015. The CO compiled and forwarded the administrative file, which I received on June 3, 2015. I held a telephone conference with Mr. Gonzalez and Counsel for the CO on June 5, 2015, to discuss the status of the case and to arrange a hearing. The parties agreed to hold the hearing by telephone

conference at 1:00 p.m. (EST) on June 9, 2015, and the hearing was conducted at that date and time. Having considered the evidence contained in the administrative file (“AF”)¹, the evidence and arguments presented by the parties, and the applicable laws and regulations, the CO’s decision to issue the NOD is **AFFIRMED**.

Statutory and Regulatory Framework

To fulfill the Secretary of Labor’s H-2A responsibilities under the INA, the Secretary promulgated rules in 20 C.F.R. Part 655, Subpart B, governing the labor certification process for temporary agricultural employment in the United States. Among the provisions relevant here are (emphasis added below):

§655.121 Job orders.

(a) *Area of intended employment.* (1) Prior to filing an *Application for Temporary Employment Certification*, the employer must submit a job order, Form ETA-790, to the SWA [State Workforce Agency] serving the area of intended employment for intrastate clearance, identifying it as a job order to be placed in connection with a future *Application for Temporary Employment Certification* for H-2A workers. **The employer must submit this job order no more than 75 calendar days and no fewer than 60 calendar days before the date of need.** ...

* * *

(b)(2) If, after providing responses to the deficiencies noted by the SWA, the employer is not able to resolve the deficiencies with the SWA, the employer may file an *Application for Temporary Employment Certification* pursuant to the emergency filing procedures contained in §655.134, with a statement describing the nature of the dispute and demonstrating compliance with its requirements under this section. In the event the SWA does not respond within the stated timelines, the employer may use the emergency filing procedures noted above. If upon review of the *Application for Temporary Employment Certification* and the job order and all other relevant information, the CO concludes that the job order is acceptable, the CO will direct the SWA to place the job order into intrastate and interstate clearance and otherwise process the *Application* in accordance with the procedures contained in §655.134(c). **If the CO determines the job order is not acceptable, the CO will issue a Notice of Deficiency** to the employer under §655.143 of this subpart directing the employer to modify the job order pursuant to paragraph (e) of this section. The Notice of Deficiency will offer the employer the right to appeal. ...

* * *

¹ Each page of the administrative file is numbered in the lower right corner and is cited “AF ____” herein.

§655.122 Contents of job offers.

* * *

(e) *Workers' compensation.* (1) The employer must provide workers' compensation insurance coverage in compliance with State law covering injury and disease arising out of and in the course of the worker's employment. If the type of employment for which the certification is sought is not covered by or is exempt from the State's workers' compensation law, the employer must provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment that will provide benefits at least equal to those provided under the State workers' compensation law for other comparable employment.

(2) **Prior to issuance of the temporary labor certification, the employer must provide the CO with proof of workers' compensation insurance coverage meeting the requirements of this paragraph**, including the name of the insurance carrier, the insurance policy number, and proof of insurance for the dates of need, or, if appropriate, proof of State law coverage.

* * *

§655.130 Application filing requirements.

All agricultural employers who desire to hire H-2A foreign agricultural workers must apply for a certification from the Secretary by filing an Application for Temporary Employment Certification with the NPC designated by the OFLC Administrator. The following section provides the procedures employers must follow when filing.

(a) *What to file.* An employer, whether individual, association, or an H-2ALC, that desires to apply for temporary employment certification of one or more nonimmigrant foreign workers **must file a completed *Application for Temporary Employment Certification* form and, unless a specific exemption applies, a copy of Form ETA-790, submitted to the SWA serving the area of intended employment**, as set forth in §655.121(a).

(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.**

* * *

§655.132 H-2A labor contractor (H-2ALC) filing requirements.

* * *

(b) *Required information and submissions.* **An H-2ALC must include in or with its Application for Temporary Employment Certification the following:**

....

(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. The bond document must clearly identify the issuer, the name, address, phone number, and contact person for the surety, and provide the amount of the bond (as calculated pursuant to 29 CFR 501.9) and any identifying designation used by the surety for the bond.

(4) **Copies of the fully-executed work contracts with each fixed-site agricultural business** identified under paragraph (b)(1) of this section.

* * *

§655.134 Emergency situations.

(a) *Waiver of time period.* 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.

(b) *Employer requirements.* **The employer requesting a waiver of the required time period must concurrently submit to the NPC and to the SWA serving the area of intended employment a completed *Application for Temporary Employment Certification*, a completed job order on the Form ETA-790, and a statement justifying the request for a waiver of the time period requirement.** The statement must indicate whether the waiver request is due to the fact that the employer did not use H-2A workers during the prior agricultural season or whether the request is for good and substantial cause. If the waiver is requested for good and substantial cause, the employer's statement must also include detailed information describing the good and substantial cause which has necessitated the waiver request. Good and substantial cause may include, but is not limited to, 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. ...

(c) *Processing of emergency applications.* **The CO will process emergency *Applications for Temporary Employment Certification* in a manner consistent with the provisions set forth in §§655.140 through 655.145 and make a determination on the *Application for Temporary Employment Certification* in accordance with §§655.160 through 655.167.** The CO may

advise the employer in writing that the certification cannot be granted because, pursuant to paragraph (a) of this section, the request for emergency filing was not justified and/or there is not sufficient time to test the availability of U.S. workers such that the CO can make a determination on the *Application for Temporary Employment Certification* in accordance with §655.161. Such notification will so inform the employer using the procedures applicable to a denial of certification set forth in §655.164.

§655.141 Notice of deficiency.

(a) *Notification timeline.* If the CO determines the *Application for Temporary Employment Certification* or job order are incomplete, contain errors or inaccuracies, or do not meet the requirements set forth in this subpart, the CO will notify the employer within 7 calendar days of the CO's receipt of the *Application for Temporary Employment Certification*. A copy of this notification will be sent to the SWA serving the area of intended employment.

(b) *Notice content.* The notice will:

(1) State the reason(s) why the *Application for Temporary Employment Certification* or job order fails to meet the criteria for acceptance;

(2) Offer the employer an opportunity to submit a modified *Application for Temporary Employment Certification* or job order within 5 business days from date of receipt stating the modification that is needed for the CO to issue the Notice of Acceptance;

(3) Except as provided for under the expedited review or de novo administrative hearing provisions of this section, state that the CO's determination on whether to grant or deny the *Application for Temporary Employment Certification* will be made no later than 30 calendar days before the date of need, provided that the employer submits the requested modification to the *Application for Temporary Employment Certification* within 5 business days and in a manner specified by the CO;

(4) Offer the employer an opportunity to request an expedited administrative review or a de novo administrative hearing before an ALJ of the Notice of Deficiency. The notice will state that in order to obtain such a review or hearing, the employer, within 5 business days of the receipt of the notice, must file by facsimile or other means normally assuring next day delivery a written request to the Chief ALJ of DOL and simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments that the employer believes will rebut the basis of the CO's action ...

* * *

Case History

On January 7, 2015, Employer designated Mr. Gonzalez as his authorized agent in order “[t]o file all Necessary documents with the Labor Commissioner, Immigration and Naturalization Service, American Consul in Mexico, and any other necessary to secure all H-2A working permits.” (AF 115).

Sometime on or before January 31, 2015, Employer entered into a contract with Ronnie Carter Farms, Inc., to provide approximately 40 workers to harvest about 25 acres of blueberries in Samson County, North Carolina, from May 15 to July 15, 2015. (AF 106).

According to the recruitment information provided in Employer’s H-2A Application, Employer or Mr. Gonzalez published an advertisement in a local newspaper on February 12 and February 19, 2015, seeking workers for the Ronnie Carter Farms job. (AF 82).

Employer signed the Agricultural and Food Processing Clearance Order (ETA Form 790) on March 22, 2015. (AF94). He signed a Request for Conditional Access into the agricultural clearance order system on March 23, 2015. (AF 104).

Mr. Gonzalez prepared a letter dated May 4, 2015, addressed to the North Carolina Division of Workforce Solutions, forwarding Employer’s Agriculture and Food Processing Clearance Order (ETA Form 790). In the letter, Mr. Gonzalez acknowledged that the filing was late and said: “we have problems that have to be attent (sic) urgently, and the time flowed out of our control.” AF117. The North Carolina Division of Workforce Solutions received the letter and Clearance Order on May 6, 2015. (AF 65).

Mr. Gonzalez prepared a letter to the CO dated May 5, 2015, forwarding Employer’s H-2A Application for 49 workers to harvest fruits and vegetables in Samson County, North Carolina (ETA Form 9142A). In the letter, Mr. Gonzalez acknowledged that the application was late. He explained:

I know that the petition ETA Form 9142A, is untimely, but it have been an struggle (sic) of a big magnitud (sic), trying to obain (sic) an addition to our Farm Labor Certification, getting in other words the Housing Authorization, You know the procedure, I can not tell you that it is Time consuming and waiting for the USDOL; Wage and hour division to make the necessary correction on the FLC Certification, to be Frankly it takes at least 30 days waiting. (AF 116).

Mr. Gonzalez requested that the CO process Employer’s application under the emergency procedures set forth in 20 C.F.R. § 655.134. (AF 116). The Chicago National Processing Center received the application and entered it into the iCERT Portal System² on May, 8, 2015. (AF 77).

² iCERT stands for Immigration Certification. The iCERT Portal System is the Department of Labor’s automated program for processing and tracking foreign labor certifications.

Both the H-2A Application for Temporary Employment Certification and the Agricultural and Food Processing Clearance Order listed May 15, 2015, as the beginning date for the period of employment and July 15, 2015, as the approximate end date. (AF 78 and 89).

On May 14, 2015, the CO issued a NOD listing 22 deficiencies in Employer's H-2A Application and Clearance Order. The NOD identified the specific regulatory requirements that were involved, described how the information Employer provided was deficient, and explained the corrective action required to resolve each deficiency. The NOD informed Mr. Gonzalez of his right, on behalf of Employer, to modify the application. It also informed him that he could request expedited administrative review or de novo review by an administrative law judge. (AF 49-64).

On May 18, 2015, Mr. Gonzalez completed a modification that addressed the items listed in the NOD and sent it to the CO. (AF 18-26). He also sent a letter to the Chief Administrative Law Judge that same day requesting de novo review. (AF 27-48). In the request for de novo review, Mr. Gonzalez said he wanted a hearing "TO PROVE THE Deficiencies are only just that word without no prove." (AF 27).

The Hearing

The Notice of Hearing issued on June 5, 2015, told the parties that if they wanted to offer any evidence not contained in the administrative file it had to be submitted not later than 9:00 a.m. the morning of the hearing. In the hearing, Counsel for the CO said she had no additional evidence. (TR 11-12). Mr. Gonzalez said that he had submitted two documents via fax, but there was no indication at the time that the documents reached the Office of Administrative Law Judges or Counsel for the CO prior to the start of the hearing. (TR 9-11). Mr. Gonzalez identified the documents as a Farm Labor Contractor (FLC) Certificate of Registration reflecting that Employer was authorized to provide transportation, housing and driving, plus a copy of a \$10,000.00 surety bond issued to Employer. (TR 9-10). Mr. Gonzalez said he would submit the two documents again by fax after the hearing. (TR 11). I noted that it appeared both of the documents were already included in the administrative file at pages P22 and P25. Mr. Gonzalez agreed that those were the same documents as the ones he had faxed prior to the hearing and acknowledged that he would not need to submit them again.³ (TR 23).

Mr. Gonzalez called Employer as his only witness at the hearing. (TR 13). Employer joined the hearing by telephone from North Carolina, was sworn, and participated with the assistance of a Spanish/English translator provided by the Office of Administrative Law Judges. Mr. Gonzalez asked Employer if he had sent Mr. Gonzalez a copy of the FLC Certificate of Registration and surety bond referenced above, and Employer answered in the affirmative. (TR 19). Mr. Gonzalez had no further questions and Counsel for the CO had no questions. Employer was excused. (TR 19).

³ Mr. Gonzalez had faxed the documents to the Office of Administrative Law Judges in a timely manner; however, I did not receive them until after the hearing adjourned. In addition to the two documents referenced in the hearing, Mr. Gonzalez also submitted a one page cover letter and one page from a Farm Labor Contractor Application form that was blank. Those two pages were not included in the administrative file. I have marked the entire five-page submission as Employer's Exhibit (EX) and numbered the pages 1-5. It is attached to the record.

Counsel for the CO called the CO as her only witness. The CO participated by telephone from his office in Illinois. After being sworn, he testified that the regulations allowed seven days to evaluate an application and issue either a NOD or a Notice of Acceptance (NOA). (TR 25). In this case, he issued a NOD that listed a number of deficiencies. He said some of the deficiencies were minor “form errors” that would be easy to fix, but others would require Employer to take some affirmative actions before the application could move forward for approval. (TR 26). Among the deficiencies that would prevent moving the application forward were: (1) the failure to submit an original surety bond, (2) the submission of a workers’ compensation insurance policy that did not apply to Employer or to the area where the work was to be performed, (3) the failure to submit a copy of the contract between Employer and Ronnie Carter Farms for the work that was the subject of the application, and (4) the failure to justify why Employer was unable to file the application in a timely manner and qualified for an emergency waiver.⁴ (TR 26-27). On cross-examination by Mr. Gonzalez, the CO said that he had reviewed the information provided in the modification but he had not taken any action because the request for de novo review by an administrative law judge divested him of authority to do so. (TR 28). He said that even with the additional information provided in the modification there were still deficiencies that had to be addressed before a NOA could be issued. (TR 27). The CO was excused from the hearing.

I advised both parties that they were not required to submit post-hearing briefs, but if they desired to do so the deadline for submission was close of business on Friday, June 12, 2015. (TR 32). Counsel for the CO submitted a brief on June 12, 2015. It is four pages in length and has been marked AX (Agency Exhibit) 1 and is appended to the record. I did not receive a post-hearing submission from Mr. Gonzalez on behalf of Employer.

Discussion

The Employer exercised his right under 20 C.F.R. § 655.141(c)⁵ to request de novo review before an administrative law judge of the CO’s decision to issue a NOD. To fulfill my duty under 20 C.F.R. § 655.171(b), I am required to conduct my own “independent examination of the entire record.” *Agyeman v. INS*, 296 F.3d 871, 876 (9th Cir. 2002). In this case, that includes the administrative file, the information adduced at the hearing, and the information submitted by the parties and appended to the record. Having independently evaluated the record, and as explained more fully below, I find that the H-2A Application (ETA Form 9142A) and Clearance Order (ETA Form 790) were submitted late without justification that would qualify for a waiver of the time period requirements and that Employer failed to satisfy all of the relevant requirements of the H-2A program regulations necessary to receive a NOA.

⁴ The CO also testified that the difference in how many workers Employer indicated he wanted to hire in his H-2A Application (49 workers) and the amount of housing capacity that had been inspected and approved (accommodating 30 or 31 workers) was a significant deficiency. (TR 26-27). A May 12, 2015 email to the CO from the SWA said housing for 31 workers had been certified. (AF 65). In the modification Mr. Gonzalez responded to the deficiency and said Employer amended his application to 31 workers. (AF 45). Accordingly, this deficiency is resolved and does not factor into my analysis.

⁵ The NOD incorrectly cites 20 C.F.R. § 655.142(c). That provision covers appeals from denials of modified applications. Nonetheless, both § 655.141(c) and § 655.142(c) cite to the exact same procedures in § 655.171.

1. Emergency Situation Exception for Late Submission

The record shows that when Employer began this process in January 2015 his objective was to successfully navigate the H-2A program requirements in time to provide workers to Ronnie Carter Farms to harvest their blueberry crop beginning on May 15. Unfortunately, in the 129 days from January 7 when he designated Mr. Gonzalez as his agent and May 15 when the work for Ronnie Carter Farms was to begin, Employer's objective was not achieved.

The H-2A regulations establish time limits for the submission of Clearance Orders (not more than 75 or less than 60 calendar days before the date of need) and H-2A Applications (not less than 45 calendar days before the date of need). Here, there were fewer than ten days remaining before the scheduled start date of Employer's work at Ronnie Carter Farms when the documents reached the offices responsible for processing and evaluating them. The CO has the authority to waive the time requirements in an emergency situation provided (1) the employer files a completed application with the CO and a completed Clearance Order with the State Workforce Agency, and (2) the employer submits justification for a waiver. Employer did not satisfy either of these requirements.

First, even when a late submission is justified the CO is required to "make a determination on the Application for Temporary Employment Certification in accordance with §§655.160 through 655.167." In other words, invoking the emergency provision does not excuse an applicant from satisfying the requirements he or she would have been required to meet had the submission been timely. Here, there were deficiencies in both the Clearance Order and the H-2A Application (discussed separately below). A complete application is one that contains the information necessary for the CO to determine that the H-2A Temporary Employment Certification requirements are met and the application qualifies for a NOA. That was not the case here.

Second, as of the date of this decision Employer has not justified his inability to file his H-2A Application and Clearance Order within the time limits specified in the regulations. In the May 4, 2015, letter to the SWA, Mr. Gonzalez said the Clearance Order was late because "time flowed out of our control." (AF 117). In his May 5, 2015, letter to the CO, Mr. Gonzalez said the H-2A Application was late because it had been a struggle to get housing added to Employer's Farm Labor Contractor Certificate. (AF 116). In the NOD, the CO advised Mr. Gonzalez that "[t]he employer must provide proof that the DOL Wage and Hour has made a mistake in the issuing of the FLC certificate that corresponds to this application." (AF 59). In response, in the modification dated May 18, 2015, Mr. Gonzalez said:

[T]herefore we conclude (sic) asking the CO for This extention (sic) because the CO knows how longt (sic) it takes for the USD to Process , the Certification of Labor as well the Authorization for Housing other wise we let the crop perish and buy in foreign Countries tha (sic) was not the idea of the Honorables LEGISLATED, but to bring worker so our agriculture flourishes (sic), not to anybody calling yourself an American trying to ruin our economy. (AF 20).

The CO testified that the lack of justification for invoking the emergency waiver provision was a deficiency that would require affirmative action by Employer before he could move forward with the application. (TR 26-27). Despite the CO specifically noting that this deficiency was a show-stopper, Mr. Gonzalez offered no further explanation or justification for the late filings.

The most reasonable interpretation of the information presented is that Mr. Gonzalez waited to file the Clearance Order with the SWA and the H-2A Application with the CO until after Employer obtained a FLC Certificate of Registration and that there was some additional time incurred while getting the authorization for housing added to Employer's certificate.⁶ What is missing is any explanation about the efforts made to obtain the FLC Certificate and the addition of the housing authorization in a timely manner.

There are two FLC Certificates bearing Employer's name in the record. Both were approved by Jeffrey Genkos, the National Certification Program Manager, on May 1, 2015. The first one reflects that Employer is "Not Authorized" to furnish housing and it was included with the application Mr. Gonzalez submitted to the CO on May 5, 2015. (AF 107). The second one reflects that Employer is "Authorized" to furnish housing and it was attached as "Appendix A" to the modification Mr. Gonzalez submitted on May 18, 2015. (AF 22). While the second one bears the same May 1 approval date as the first one, it shows that the authorization for housing was added to Employer's FLC certificate on May 4, 2015.⁷

Employer designated Mr. Gonzalez as his agent on January 7, 2015. (AF 115). There is nothing in the record documenting any of the steps taken to obtain a FLC Certificate between January 7 and May 1 when the certificate was approved. There is, for example, no evidence of when Employer first applied for a FLC Certificate, what problems he encountered with the Wage and Hour Division during the review and approval process, and what efforts he made to try and resolve those problems, if any, in a timely manner. Mr. Gonzalez knows the statutes, regulations and procedures for obtaining a FLC Certificate, and he has 20 or more years of personal experience in that area. *Tito E. Gonzalez*, 2004-MSP-00005 R and P (Jul. 2, 2004), *aff'd* ARB Case No. 04-178 (Mar. 29, 2007). Had there been some anomaly in the processing of Employer's application for a FLC Certificate that caused undue delay it may have provided justification for a waiver of the time limits under the emergency situation exception in 20 C.F.R. § 655.134. Here, however, despite multiple opportunities to submit evidence or offer a narrative explanation, neither Employer nor his agent chose to do so.⁸ The CO acted in accordance with the requirements of the regulations and in a reasonable manner when he found there was insufficient justification for a waiver and included it among the list of deficiencies in the May 14,

⁶ The FLC certificate specifies whether the named contractor – in addition to recruiting, soliciting, furnishing, hiring and employing workers under the Migrant & Seasonal Agricultural Worker Protection Act – is or is not authorized to provide transportation, housing and driving as well. (AF 22).

⁷ A FLC Certificate is one of the items required to be submitted with an Application for Temporary Employment Certification. 20 C.F.R. § 655.132(b)(2).

⁸ In the letter to the CO on May 5, 2015, Mr. Gonzalez said the application was not filed in a timely manner and warranted a waiver because it had been a struggle to get the housing authorization added to the FLC Certificate. He said, "Frankly it takes at least 30 days waiting." (AF 116). As noted above, Employer's FLC Certificate was approved on May 1, 2015, and the housing authorization was added on May 4, 2015. That is three days.

2015, NOD. Having independently reviewed the record, I arrive at the same conclusion as the CO; Employer has not justified a waiver of the time period requirements.

2. **Deficiencies in the H-2A Application and Clearance Order**

The CO identified 22 deficiencies in the H-2A Application and Clearance Order. (AF 49-64). The CO testified that some of the deficiencies were minor and could be easily corrected, but others required some affirmative action by Employer before the application could move forward for approval. (TR 26-27). Justifying a waiver of the time limits falls into the latter category and was discussed earlier. Other significant deficiencies the CO noted that remain unresolved are: (1) the failure to submit an original surety bond, (2) the submission of a workers' compensation insurance policy that did not name Employer as an insured or apply to the area where the work was to be performed, and (3) the failure to submit a copy of the contract between Employer and Ronnie Carter Farms for the work that was the subject of the application.

a. **Failure to Submit an Original Surety Bond**

20 C.F.R. § 655.132 states: "An H-2ALC must include in or with its *Application for Temporary Employment Certification* ... the original surety bond as required by 29 CFR 501.9."⁹ The CO noted as a deficiency that Employer's application contained a photocopy of the surety bond, not the original as required by the regulation. (AF 36-37). Mr. Gonzalez addressed the deficiency in the May 18, 2015, modification. He said:

Surety bond was included in the original 9142A application with all the information the Assistant CO are Asking. I believe that this is done on purpose by the CO-Assistants to Annoy this Court (yours), the ,Judge and myself, this Agent typing the unnecessary explanation what happend (sic) to the originals; If we call the Wage and Hour Division USDL they tell you is there or call HAVOR (sic) INSURANCE CO. TO VERIFY THE INSURANCE of the bond; We are however are including a copyof (sic) the original Markert (sic) Exhibit B. (AF 20 and 25).

Mr. Gonzalez did not address this issue at the hearing despite the CO's testimony that it was a deficiency that precluded moving the application forward. The explanation Mr. Gonzalez provided in the modification corroborates the CO's contention that the application did not include the original surety bond as required by the regulation. Mr. Gonzalez said the surety bond was included with the ETA Form 9142A H-2A Application and a telephone call to the Department of Labor's Wage and Hour Division or to Harbor Insurance Company would verify it. First, Employer's ETA Form 9142A was filed with the Employment and Training Administration's Chicago National Processing Center, not the Wage and Hour Division's Southeast Farm Labor Certificate Processing Center in Atlanta that handles applications for FLC certificates in the region where Employer resides. No evidence was presented showing that a surety bond is a requirement for obtaining a FLC certificate from the Wage and Hour Division.

⁹ 29 C.F.R. § 501.9(a) states in pertinent part, "Every H-2ALC must obtain a surety bond demonstrating its ability to discharge financial obligations under the H-2A program. The original bond instrument issued by the surety must be submitted with the Application for Temporary Employment Certification."

Second, the copy of the surety bond submitted with both the application and the modification identifies SureTec Insurance Company, not Harbor Insurance Company, as the surety. (AF 25 and 111-112). Harbor Insurance Company is listed on a workers' compensation insurance certificate that was included with Employer's application. However, an insurance policy covering liability for on-the-job injuries to workers and a surety bond guaranteeing payment of wages and benefits are separate and distinct instruments. (AF 105). In any event, the burden is on the applicant to prove that he has satisfied the requirements of the regulation, not on the CO to go out and search for missing pieces.

b. **Failure to Provide Workers' Compensation Insurance Coverage**

20 C.F.R. § 655.122(e) requires an applicant for Temporary Employment Certification to provide the CO proof of workers' compensation insurance coverage that satisfies applicable state law requirements. The CO noted as a deficiency that the workers' compensation insurance certificate Employer provided was valid for Texas and did not include the Employer among the insured parties. (AF 54-55). The insurance certificate that accompanied the application listed the insured as: Harbor America Florida, Harbor America West, Harbor America Central, Union Strategic Alliance, Harbor America Coastal, Harbor America Southwest, and Harbor America East, all with a business address in Texas. (AF 105). There is no evidence of Employer being affiliated with any of those entities. Mr. Gonzalez discussed the workers' compensation insurance issue in the May 18, 2015, modification. He said:

Obviously, you can see that in order to Stamp a Certification, Wage and Hour Division had to see a compensation (sic) Insurance document. We send the originals 9142A with the compensation Insurance, otherwise they Wage and Hour Division of the Department of Labor Would not send the 511, (certidfcate (sic) of registration). (AF 19).

Mr. Gonzalez did not address this issue at the hearing despite the CO's testimony that it was a deficiency that precluded moving the application forward. The explanation Mr. Gonzalez provided in the modification corroborates the CO's contention that the application did not provide proof of workers' compensation insurance coverage that complied with state law as required by the regulation. There is no indication that the workers' compensation insurance certificate that was submitted with the application has any connection to Employer or satisfies the workers' compensation requirements of the State of North Carolina. The burden is on the applicant to provide the documentation required by the regulation, not on the CO to try and fill the gaps.

c. **Failure to Submit a Copy of the Contract with Ronnie Carter Farms, Inc.**

20 C.F.R. § 655.132 states: "An H-2ALC must include in or with its *Application for Temporary Employment Certification* ... copies of the fully-executed work contracts with each fixed-site agricultural business identified under paragraph (b)(1) of this section." The CO noted as a deficiency that Employer's application did not contain a contract signed by both Employer and Ronnie Carter Farms, Inc. (AF 37-38). Mr. Gonzalez responded in the May 18, 2015, modification saying that Employer would provide a "Work contract to every worker in their own

language” (AF 46). It is clear that the modification did not address the deficiency noted in the NOD.¹⁰ Mr. Gonzalez did not address this issue at the hearing despite the CO’s testimony that it was a deficiency that precluded moving the application forward.

“The CO has discretion to carry out his responsibilities under the Act and regulations.” *Servicios Agricolas Mexicanos (SAMCO)*, 2003-TLC-00007 (Jul. 24, 2007). Except where expressly authorized by the Secretary, the CO’s discretion does not extend to waiving the requirements of the H-2A program. Here, the regulation requires an applicant to provide copies of “fully-executed work contracts with each fixed-site agricultural business” where he or she intends to provide workers. Employer submitted a letter from Lucas Carter saying “I have contracted Valentino Lopez to harvest our blueberry crop,” but he did not submit a copy of the “fully-executed” contract. (AF 106). Not only is there no evidence that the CO acted in bad faith by including this in the list of deficiencies, he would have been derelict in performing his duties had he waived an express requirement without the authority to do so.

3. Conclusion

The burden is on the applicant to demonstrate that his H-2A application satisfies the requirements for approval of a Temporary Employment Certification. *Catnip Ridge Manure Application, Inc.*, 2014-TLC-00078 (May 28, 2014). Here, the CO concluded that Employer failed to satisfy that burden and he issued a NOD. Even now, after several opportunities to submit additional information for consideration during this de novo review, the deficiencies discussed above have not been cured and still preclude issuing a NOA.

It is unfortunate that Employer was unable to obtain the certificate he needed to provide H-2A workers to harvest the blueberry crop for Ronnie Carter Farms. There were multiple steps required for him to successfully complete the process; but the regulations are not especially lengthy or complicated and he had an experienced agent assisting him. He also had a CO who spelled out exactly what was required to cure the defects in his application in order to obtain a NOA. But rather than bringing the application into compliance in a timely manner and perhaps salvaging the Ronnie Carter Farms opportunity, Employer’s agent, Mr. Gonzalez, requested de novo review, a process with which he is familiar based upon his prior experience.¹¹ Mr. Gonzalez knew or should have known that even a ruling in favor of Employer would be a Pyrrhic victory since most of the blueberry harvesting period would be over before we could hold a hearing and I could render a decision.¹² Former Chief Administrative Law Judge Vittone offered Mr. Gonzalez some sound advice seven years ago that bears repeating here:

¹⁰ Employer’s failure to give written assurance that he would provide each worker a copy of the contract between Employer and the worker in a language the worker understood was listed separately as a deficiency in the application. (AF 56-57). Mr. Gonzalez addressed that deficiency in the modification (*see* Modification Number 8, AF 19) and then mistakenly responded to it again where he should have addressed the failure to provide a copy of the contract between Employer and Ronnie Carter Farms (*see* Modification Number 10, AF 20).

¹¹ *Carol Paul*, 2008-TLC-00025 (May 2, 2008). Mr. Gonzalez was the agent for a FLC who filed a deficient H-2A Application for Temporary Employment Certification to provide workers to harvest blueberries in New Jersey and Maine. Mr. Gonzalez requested de novo review rather than modify the application to address the deficiencies listed in the NOD. A decision was rendered 17 days after the request for de novo review.

¹² In the telephone conference on June 5 and the hearing on June 9, Mr. Gonzalez said he had requested de novo review because he did not trust the CO to make a fair decision. He said several times that this case is just one of

In the future, Respondent would be well advised to work with the CO to cure any deficiencies raised and to at least consult with the CO about the questions raised. Perhaps then Respondent would not have to ask for *de novo* review and instead obtain a favorable determination on his application.

ORDER

In view of the foregoing discussion, it is hereby **ORDERED** that the Certifying Officer's decision to issue a Notice of Deficiency is **AFFIRMED**.

MORRIS D. DAVIS
Administrative Law Judge

four or five current cases where arbitrary actions by the CO prevented his FLC principals from getting applications approved. (TR 14-15, 29). I explained to Mr. Gonzalez in both settings that my *de novo* review is limited solely to this one case, not to the merits of any broader issues he may have with the CO or the administration of the H-2A program. (TR 29).