

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 08 May 2015**

**Case No.: 2015-TLC-00043**

**ETA Case No.: H-300-15064-029234**

*In the Matter of*

**ALBERTO CASTANON,**  
*Employer*

Certifying Officer: Charlene G. Giles  
Chicago Processing Center

Before: **ADELE HIGGINS ODEGARD**  
Administrative Law Judge

**DECISION AND ORDER**

On April 22, 2015, Alberto Castanon (“the Employer”) filed a request for review of two deficiencies the Certifying Officer listed in a Final Determination dated April 21, 2015. See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.115(a) (2009). On May 4, 2015, 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 working days after receiving the file to “review the record for legal sufficiency” and issue a decision. § 655.115(a).

**Statement of the Case**

On March 5, 2015, the United States Department of Labor’s Employment and Training Administration (“ETA”) received an application from the Employer for temporary labor certification for “Farmworkers.” AF 295.<sup>1</sup> The Employer stated that it had a seasonal temporary need for 200 farm workers from April 15, 2015 to December 5, 2015.<sup>2</sup> AF 295.

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<sup>1</sup> Citations to the 303-page Administrative File will be abbreviated “AF” followed by the page number.

<sup>2</sup> The number of farm workers requested was later adjusted to 202 because the CO found a calculation error which the Employer then corrected. AF 215, 202.

On March 12, 2015, the CO issued a Notice of Deficiency (“NOD”), citing eight deficiencies.<sup>3</sup> AF 209-216. First, the CO stated that the Employer failed to provide an original surety bond document as required by 20 C.F.R. § 655.132(b)(3) and 29 C.F.R. § 501.9. AF 212. Specifically, the CO requested that the Employer provide an original surety bond which clearly identifies the issuer, the name, address, phone number, and contact person for the surety, and the amount of the bond. AF 213. Second, the CO stated that the Employer failed to provide a copy of its Farm Labor Contractor (“FLC”) certification as required by 20 C.F.R. § 655.132(b)(2). AF 214. The CO specified that the Employer failed to provide FLC certificates for its authorized drivers.<sup>4</sup>

On March 17, 2015 the Employer responded to the NOD, which included a letter dated March 4, 2015.<sup>5</sup> AF 200. In the letter, the Employer informed the CO that it has the original surety bond and will send the bond by mail to the CO’s office. AF 202. The Employer also wrote that it has contacted the Wage and Hour Division which informed him that “they have sent the driver’s FLC certificates with driving authorization the 10<sup>th</sup> of this month. As soon as I receive them I will send them to your office.” AF 202. On March 20, 2015, the Employer submitted the renewed FLC Certificate of Registration along with the FLC certificates of its drivers. AF 187-199. On March 27, 2015, the CO received the Employer’s surety bond and bond rider dated March 5, 2015.<sup>6</sup> AF 297-301.

On March 31, 2015, the CO wrote a response to the Employer’s March 17, 2015 letter, stating that there are still deficiencies with the Employer’s application.<sup>7</sup> AF 135. The CO reiterated that the Employer failed to provide an original surety bond as required by the regulations. AF 136. Furthermore, the CO noted that the Employer failed to provide any FLC certificates for its authorized drivers. AF 136. The CO acknowledged that it received the Employer’s March 17 response to the NOD on March 24, 2015 but reported that the FLC certificates “were not included with the worker’s compensation document that was received.” AF 136. On the same day, the Employer responded to the CO via email attaching the following

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<sup>3</sup> Based on the record before me, I find that the CO determined the Employer adequately cured the other alleged deficiencies prior to the CO’s Final Determination. Therefore, this Decision will focus on the deficiencies that, in the CO’s view, the Employer failed to cure.

<sup>4</sup> I note that the CO has been inconsistent on the issue of FLC/FLCE certificates. In the March 12 NOD and the March 31 response, the CO wrote that the Employer “failed to provide any FLC or FLCE certificates,” however, in the Denial Letter, the CO wrote that the Employer did in fact provide an FLC certificate with its initial application but that the certificate contained expired vehicle authorizations. AF 215, 10.

<sup>5</sup> I find that the Employer made a mistake in dating the letter March 4, 2015 as it is apparent from the record that the letter is in response to the CO’s NOD.

<sup>6</sup> It is unclear whether the surety bond was submitted with the bond rider as the surety bond is located in front of a cover letter for the bond rider. However, because the surety bond is contained in the record and located right in front of the bond rider, I assume that the CO received the surety bond along with the bond rider.

<sup>7</sup> The CO cited three deficiencies, only two of which are at issue on appeal.

documents: the Employer's FLC certificate, the driver's FLC certificates, the Employer's "signed assurance," and a UPS tracking link for the surety bond.<sup>8</sup> AF 134.

On April 21, 2015, the CO issued a Final Determination denying the Employer's application (the "Denial Letter"), citing two deficiencies. AF 8. First, the CO wrote that the Employer provided "expired vehicle authorizations" with its FLC certificate, thus failing to satisfy the requirement under 20 C.F.R. § 655.132(b)(2). AF 10. The CO noted that the Employer provided a new copy of the FLC certificate on March 24, 2015 but that the certificate did not include the vehicle authorizations. AF 10. Consequently, the CO denied the Employer's application on the basis that it has not received any updated or current vehicle authorizations from the Employer.

Second, the CO denied the Employer's application because the Employer did not submit an original surety bond as required under 20 C.F.R. § 655.132(b)(3). AF 11. The CO noted that on March 27, 2015, the Employer submitted a bond rider without the original bond. AF 12. The CO stated that "submitting a rider or evidence of a 'continuous' bond, even if an original document, is not sufficient to satisfy the regulations. Such documents provide evidence of an existing bond rather than a new bond specific to the application." AF 12. The CO also noted that on April 20, 2015, the Employer submitted an original surety bond. AF 12. However, the CO rejected this bond because it was a duplicate and was associated with an already certified application. AF 12.<sup>9</sup> The CO stated that "a new bond, and distinct bond, is required for each *Application for Temporary Employment Certification*." AF 12. Consequently, the CO denied the Employer's application on the basis that it has not received an original surety bond that is not associated with another case.

### **Discussion**

1. Whether the Employer failed to provide a surety bond in accordance with 20 C.F.R. § 655.132(b)(3).

Twenty C.F.R. § 655.132(b)(3) requires an H-2A employer to provide the CO, among other documentation:

(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.

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<sup>8</sup> The "signed assurance" refers to a signed copy of the Intrastate and Interstate Clearance Order required under 20 C.F.R. § 653.501.

<sup>9</sup> The already certified application's ETA case number is H-300-15079-784019.

The employer bears the burden of proving that it is entitled to labor certification. 8 U.S.C. § 1361; 20 C.F.R. § 656.2(b). The CO found that the Employer failed to provide an original surety bond in its initial application and that all of the Employer's subsequent submissions were deficient. AF 11-12. However, the record does in fact contain the original surety bond along with a bond rider dated March 5, 2015.<sup>10</sup> AF 297. Accordingly, I find that the CO improperly concluded that the Employer failed to provide an original surety bond.

2. Whether the Employer failed to provide a valid FLC certificate in accordance with 20 C.F.R. § 655.132(b)(2).

Twenty C.F.R. § 655.132(b)(2) provides that an H-2A labor contractor must provide “a copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration . . . identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC.” In its March 12, 2015 NOD, the CO stated that the Employer failed to provide any FLC certificates for its authorized drivers. On March 20, 2015, the Employer provided the FLC certificates for all of its authorized drivers.<sup>11</sup> AF 187-199. Despite the Employer's submission, the CO, in a letter dated March 31, 2015, wrote that it never received the FLC certificates. AF 136.

As the record contains unexpired, complete copies of the FLC certificates for all of the Employer's authorized drivers, I find that the Employer has satisfied its requirements under 20 C.F.R. §655.132(b)(2).

In the Denial Letter, the CO denied the Employer's application because the Employer “submitted expired vehicle authorizations” with its FLC certificate.<sup>12</sup> AF 10. The first time that the CO informed the Employer of the vehicle authorization deficiency was in the Denial Letter. Accordingly, the Employer was not given an opportunity to address this deficiency before the CO denied the application. Consequently, I find that the CO incorrectly denied the Employer's application because the CO failed to provide the Employer with notice and an opportunity to cure the deficiency. See 20 C.F.R. §655.141(b)(1) (notice of deficiency must state reasons why application fails to meet criteria for acceptance).

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<sup>10</sup> The ALJ record, which was delivered to me electronically, only contains copies. The CO, in correspondence with the Employer and in the Denial Letter, did not indicate whether the Employer submitted copies of any documents rather than originals. Therefore, I will presume that the CO's office possesses the original copies of the surety bond and bond rider.

<sup>11</sup> A copy of all of the FLC certificates is included in the record. Although the copies are difficult to read, I can discern that the expiration dates for the drivers are February 28, 2016 and February 29, 2016.

<sup>12</sup> Based on the record before me, it is unclear whether the Employer submitted expired vehicle authorizations in its application because the copy of the pages of the FLC certificate containing vehicle information is illegible. AF 138, 190.

In light of the foregoing, denial is inappropriate, and this matter is remanded to the CO. Upon remand, the CO is instructed to consider the original surety bond dated March 5, 2015 and the authorized drivers' FLC certificates submitted on March 20, 2015. Furthermore, the CO is instructed to review the Employer's FLC certificate to confirm whether the Employer submitted expired vehicle authorization. If the CO finds that the vehicle authorizations are in fact expired, the CO must give the Employer an opportunity to respond to this deficiency.

**Order**

Accordingly, it is hereby **ORDERED** that the Certifying Officer's determination is **VACATED** and **REMANDED** for further processing consistent with this decision.

SO ORDERED.

**ADELE H. ODEGARD**  
Administrative Law Judge

Cherry Hill, New Jersey