

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 14 July 2015**

**BALCA Case No.: 2015-TLC-00058**

**ETA Case No.: H-300-15174-043625**

*In the Matter of:*

**DLR FRUIT & VEGETABLE**  
*Employer*

**Certifying Officer: William L. Carlson**  
**Chicago National Processing Center**

**Appearances: Theresa Ward**  
**National Agricultural Consultants, LLC**  
**For the Employer**

**Stephen Jones, Esquire**  
**Office of the Solicitor**  
**Washington, D.C.**

**Before: LARRY W. PRICE**  
**Administrative Law Judge**

**DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION**

This matter arises out of a request for administrative review of the Certifying Officer's denial of an H-2A temporary labor certification application filed by DLR Fruit & Vegetable (the Employer).

**STATEMENT OF THE CASE**

On June 23, 2015, the Certifying Officer (CO) received the Employer's Form ETA 9142 Form ETA 9142 Application for Temporary Employment Certification for twenty-eight farmworkers. The Employer requested waiver of the usual timelines due to special circumstances, namely, because the contracting farmer had not reached out to the Employer until the week before and because the spring weather adversely affected the cantaloupe and watermelon harvests. (AF 26-63).<sup>1</sup>

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<sup>1</sup> AF is an abbreviation for Administrative File or Appeal File. The Employer is an H-2A labor contractor (H-2ALC), an entity that provides labor at sites owned by other entities.

On June 29, 2015, the CO rejected the application and issued a Notice of Deficiency (NOD). The NOD noted seven deficiencies, including that the Employer failed to establish an emergency situation that would warrant a waiver of the filing timelines, that the Employer failed to provide the original signed surety bond, and that the Employer failed to provide adequate housing documentation. (AF 8-16).

The Employer requested administrative review of the CO's denial on July 1, 2015. The Employer contested the rejection of the emergency waiver and noted that the other several issues listed in the NOD would be addressed and corrected. The Employer argued that it had not made use of the TLC program during the prior year's agricultural season and explained that the late cantaloupe harvest affected this year's watermelon harvest, necessitating additional farmworkers. The Employer further stated that the contracting farmer did not contact the Employer until the week prior to the Employer's submitting the TLC application. (AF 4-6).

On July 7, 2015, the Office of Administrative Law Judges received the Administrative File (AF) from the CO. The parties were afforded three business days after receipt of the AF in which to submit briefs. The Employer and the CO both filed briefs on July 10, 2015. The Employer reiterated the arguments presented in its request for administrative review and further stated U.S. workers are protected under 20 C.F.R. § 655.135(d), which requires an employer to provide employment to any qualified, eligible U.S. worker who applies for the advertised job until 50 percent of the period of the work contract has elapsed. In his brief, the CO argued that the onset of the watermelon harvest and signing of the labor contract do not qualify as unforeseen conditions outside the control of the Employer. The CO also noted that the Employer had applied for H-2A certification earlier this year and was, therefore, familiar with the regulations and time requirements. The CO further noted that the Employer failed to correct other deficiencies, i.e., failed to provide the original surety bond, the farmer's lease agreement for worker housing, and directions to the housing.

## DISCUSSION

It is the Employer's burden to show that certification is appropriate. 20 C.F.R. § 655.161(a). The applicant bears the burden of proving compliance with all applicable regulatory requirements in order to achieve certification. 8 U.S.C. § 1361 (2006).

An employer seeking temporary labor certification must file an application not less than 45 days before the requested date of need. 20 C.F.R. § 655.130(b). In some situations, the CO may waive the time period for filing temporary labor applications. 20 C.F.R. § 655.134(b) provides:

**(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.

20 C.F.R. § 655.134(b).

The Board must determine whether the CO abused his discretion in arriving at these findings. *Belle Chase Farm d/b/a Ken Slyzuik Ranch*, 2010-TLC-00039 (BALCA Jun. 17, 2014) (“[T]he regulations give the discretion for approving waivers to the CO because he is in the unique position of being able to determine whether the shortened application period will allow him to test the domestic labor market in accordance with 20 C.F.R. § 655.100(b)).

The regulations provide two means by which an employer may obtain waiver of the filing requirements: 1) that the employer did not use the H-2A workers during the prior agricultural season or 2) good and substantial cause. 20 C.F.R. § 655.134(b). Here, the CO denied waiver of the required filing time period, finding that the Employer did not establish good and substantial cause and that the Employer had previously used the H-2A program. The Administrative File shows that the Employer filed a previous labor certification request in March 2015. (AF 25). Thus, in order to obtain a waiver of the filing requirements, the Employer must have established good and substantial cause.

The Employer contends that the contracting farmer could not have known of his labor need until he contacted the Employer. Crops had been delayed due to the unusually wet spring in Indiana. The Employer does not argue that the onset of the watermelon harvest was delayed or unforeseen, only that the contracting farmer waited until June 18, less than 45 days prior to the date of need, to secure additional workers for the harvest. However, as the CO argues, these were not unforeseen circumstances. The contracting farmer would have known of the cantaloupe harvest delay and, therefore, could have anticipated the need for additional farmworkers. The Employer's H-2A filing history indicates that it is familiar with certification regulations, and it cannot be excused from the regulations in these circumstances. Accordingly, the CO acted within his discretion when he denied the Employer's Form ETA 9142 Application for Temporary Employment Certification.

Moreover, the Employer failed to provide the requisite information and documentation at the time of application. There is no indication in the Administrative File or in the Employer's brief that the surety bond or other required documentation had ever been submitted as required by 20 C.F.R. §§ 655.122(d)(1)(ii) and 655.132(b)(3) and 29 C.F.R. 501.9. Further, the CO noted in his brief that the Employer failed to remedy those deficiencies. As those deficiencies remain unresolved, denial of the Employer's temporary labor application is proper.

**ORDER**

In light of the foregoing, the Certifying Officer's decision is **AFFIRMED.**

**SO ORDERED.**

For the Board:

**LARRY W. PRICE**  
Administrative Law Judge