



Issue Date: 03 April 2015

Case No.: 2015-TLC-00018
ETA Case No. H-300-15029-556675

In the Matter of

MARIA PEREZ

Employer

DECISION AND ORDER

This proceeding arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the associated regulations promulgated by the United States Department of Labor (“the Department” or “DOL”) at 20 C.F.R. Part 655. Unless otherwise noted, citations in this Order are to the regulations set forth in Part 655.

The H-2A nonimmigrant visa program enables United States agricultural employers to employ foreign workers on a temporary basis to perform agricultural labor or services. 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1) and 1188. Employers who seek to hire foreign workers through this program must first apply for and receive a “labor certification” from the DOL. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(i)(A).

The Decision and Order that follows is based on the written record, consisting of the Appeal File (“AF”)¹ forwarded by the Employment and Training Administration (“ETA”), and the written submissions of the parties.

Procedural History

On January 29, 2015, U.S. Department of Labor’s Office of Foreign Labor Certification (“OFLC”), Chicago National Processing Center, received the named Employer’s “H-2A Application for Temporary Employment Certification,” ETA Form 9142A (AF 40-AF 48), and Employer’s “Agricultural and Food Processing Clearance Order ETA Form 790” (AF 49-AF 73) (“Employer’s Application” or “the Application”).² This application included a statement of

¹ Citations to the Administrative File will be abbreviated “AF” followed by the page number.

² Although I note that Monica Saavedra, the Employer’s agent, likely drafted the application. *See* AF 46. Ms. Saavedra’s status as an agent was confirmed in the “Agent Agreement” entered into between the Employer and Ms. Saavedra on January 23, 2015. AF 73. According to this agreement, “Our agent will file the application . . . and

temporary need, requesting seventy-four full-time workers for a three-month period of intended employment starting on March 25, 2015 and ending June 25, 2015. AF 40. The application also alleged that that temporary workers were needed for planting, harvesting and otherwise cultivating crops “in the growing season[] in Georgia,” which occurs “exclusively” during a short period of time. *Id.* Specific job duties would include harvesting, counting and packaging squash and cucumbers; vineyard planting and pruning; bailing straw; and general maintenance of the camp site. The Employer averred that such work “will be done under extreme weather conditions.” Work would be conducted from 7:00 AM to 2:00 PM at \$10.00 per hour. AF 42. The application also included a January 19, 2015 letter written by Joe Anderson of Joe Anderson Farms detailing Mr. Anderson’s intent to employ the Employer for the purposes of furnishing such temporary workers. AF 68. Mr. Anderson made assurances of his compliance “with transportation safety standards, driver licensure and vehicle insurance as required under 29 U.S.C. § 1841 and 29 C.F.R. § 500.105 and C.F.R. §§ 500.120-28.” *Id.*

On February 5, 2015, an OFLC Certifying Officer (“CO”) issued a Notice of Deficiency (“NOD”) on the Employer regarding her application for temporary labor certification. The CO identified the following deficiencies in Employer’s Application.³ AF 18.

1. Employer’s Application “failed to indicate that the job order was placed with the [State Workforce Agency (“SWA”)] no fewer than 60 days before and no more than 75 calendar days before the date of need.” *Id.*
2. Employer’s Application “did not provide an original surety bond,” as required under 20 C.F.R. § 655.132(b)(3). AF 18-19.
3. Employer checked item 16.2 of ETA Form 790 indicating that the “‘Employer will train.’ However, the [E]mployer did not include this information on the ETA Form 9142.” AF 20.
4. Employer did not provide directions to its housing and worksite locations along with ETA Form 790. *Id.*

The CO indicated that the Employer could modify its application to conform with the foregoing deficiencies, or it could request an appeal before this Tribunal. AF 16 – AF 17.

On February 20, 2015, a CO denied Employer’s Application “in accordance with Departmental regulations at 20 C.F.R. § 655.142(a) and 20 C.F.R. § 655.141(b)(5) because you have neither submitted a modified application within twelve (12) calendar days after the Notice of Deficiency was issued nor requested an expedited administrative appeal or a de novo hearing.” AF 11.

On February 20, 2015, Ms. Saavedra, in an email to certain ETA employees, indicated that she had responded to the NOD on February 9, 2015, and attached her purported response. AF 1. Ms. Saavedra did not include a time-stamped copy of the alleged response in her February

administer our paper work to qualify us for the H2A program. Our agent shall be as affective for all purpose as an original [sic].” *Id.*

³ It appears that Employer attempted to cure the deficiencies in items 3 and 4 before filing its appeal. *See* AF 8 – 10.

20, 2015 email. On February 24, 2015, an ETA employee responded to Ms. Saavedra's email, saying that the decision was final and reiterating her right to appeal before this Tribunal.

On February 20, 2015, the Employer faxed her "Notice of Appeal" to this Tribunal's Washington, D.C. Office. Employer stated her intention to appeal the CO's decision, but did not elect which type of appeal – expedited administrative review or de novo hearing – she intended this Office to conduct. In this fax, Employer included a copy of the CO's NOD with responses handwritten in the margins, as follows. First, the Employer averred that an "emergency situation" explained why it failed to comply with the Department's pre-filing requirements with the SWA. Second, Employer attached a letter purportedly dated February 9, 2015⁴ and addressed to the ETA, stating that she "will have the original surety bond before the time of need" and indicating her intent to "include two day training to the ETA Form 9142." Employer explained the "emergency situation with this petition" as follows

Mr. Anderson contacted me last minute because the Farm Labor contractor that was originally supposed to bring a crew to his farm had to cancel due to an emergency situation, which left me to submit this emergency petition in order for him to have workers and meet production. Mr. Anderson truly needs this crew, I hope you can understand this situation.

AF. 8. The Employer also attached driving directions to the work site and housing units.

On March 26, 2015, this case was assigned to me. In an Order dated March 27, 2015, I directed: (1) the Employer to elect which type of appeal she intended this Tribunal to conduct in the instant matter; (2) the parties to submit any briefing no later than April 1, 2015; and (3) the parties to notify this Tribunal by March 30, 2015, of its position on a possible third party, the Georgia Legal Services Program ("GLSP"),⁵ participating in this case from an amicus posture.

On March 31, 2015, Mr. Roethke filed a "Motion for Leave to Submit Brief *Amicus Curiae*." Mr. Roethke stated that the DOL regulations allow for participation of amici by way of written submission. *See* 20 C.F.R. § 655.1315(a)(2) ("Within 5 business days after receipt of the ETA case file the ALJ will, on the basis of the written record and after due consideration of any written submissions . . . from the parties involved or amici curiae, either affirm, reverse, or modify the CO's decision by written decision."). Mr. Roethke also alleged that: (1) Employer is a Georgia employer; (2) clients of GLSP had worked for Employer and "experienced unlawful pay practices" leading to a law suit under the Fair Labor Standards Act; and (3) "Employer is currently a judgment creditor [of its clients] in *Cirilo Martinez-Garcia, et al. v. Maria Perez, et al.*, No. 613-cv-15 (S.D. Ga.)."⁶

⁴ Nevertheless, this communication contains no confirming information that this letter was actually sent or received. Indeed, the February 24, 2015 email response from an ETA employee to Ms. Saavedra indicated that this letter was never received.

⁵ Theodore Roethke, an attorney with the Georgia Legal Services Program, Farmworker Rights Division, filed a FOIA request on this Tribunal concerning the instant matter on March 27, 2015. On or around March 30, 2015, this Office provided Mr. Roethke with documents responsive to his request.

⁶ In an email dated April 1, 2015, the Employer attached numerous documents related to this litigation, which appear to indicate Employer's payment to GLSP in apparent relief of the aforementioned *Cirilo* matter.

On April 1, 2015, the Employer sent two emails to this Tribunal's office email address. The first, sent at 3:20 PM, included the documents described in footnote six. The second, sent at 5:47 PM, I construe as Employer's brief, where she made two arguments. I take Employer's first argument as a request "to approve or return my case to the certifying process for approval" because "[w]orkers are urgently needed and essential for time sensitive agricultural work." Second, was Employer's "adamant[] and strong[]" opposition to GLSP's involvement as an amicus curiae, even though the two parties are not currently in adversarial litigation.⁷ This Tribunal did not receive a responsive brief from the Director. Finally, no amicus brief was timely filed by the GLSP.⁸

Discussion

It is settled that, throughout the labor certification process, the burden of proof in alien certification remains with the employer. *Altendorf Transport, Inc.*, 2011-TLC-00158, slip op. at 13 (Feb. 15, 2011). When considering a request for administrative review pursuant to 20 C.F.R. § 655.171, the presiding Administrative Law Judge ("ALJ") may only render a decision "on the basis of the written record and after due consideration of any written submissions (which may not include new evidence) from the parties involved or amici curiae."⁹ Accordingly, an employer may not refer to any evidence that was not a part of the record as it appeared before the CO. Here, the Employer's "brief" email, dated April 1, 2015 – for the first time – asserted that "[m]y agent did not inform me promptly concerning the denial of the case or the appeal process. As this new evidence was not a part of the record before the CO, I am unable to consider it in my review, under § 655.171. Further, it is well established that the actions, or failure to act, by an Agent are imputed to the Employer/Principle.

The regulations are strict and require denial of any temporary labor certification application where the job requirements and terms and/or conditions of employment differ from those presented to U.S. workers. The labor certification procedure is a streamlined process which does not allow for continued back and forth between the CO and Employer for the purposes of amending the Employer's application. The regulatory scheme may sacrifice equity at the expense of efficiency. Employers are required to proofread and ensure consistency between all documents prior to submitting applications. The regulations are not concerned with motive or intent. They are strict and afford little, if any, room for inaccuracy or omission on the application. The burden is on employers to submit error free documents in order to save agency

⁷ As the April 1, 2015 deadline for the filing of briefs has elapsed without GLSP's brief – and because the Employer's concern over the prejudice that it may incur should I allow GLSP, a party that it was formerly in litigation with, to participate in this appeal is well taken – I hereby **DENY** GLSP's March 31, 2015 "Motion for Leave to Submit Brief *Amicus Curiae*." See also 20 C.F.R. § 18.12 (A brief of an amicus curiae may be filed only with the written consent of all parties, or by leave of the administrative law judge granted upon motion, or on the request of the administrative law judge . . .).

⁸ I note that on April 2, 2015, GLSP did file a brief; however, it was filed after the briefing due date and accordingly was untimely.

⁹ Section 655.171 affords ALJs the ability to "either affirm, reverse, or modify the CO's decision, or remand to the CO for further action."

resources in post application corrections. *See HealthAmerica*, 2006-PER-1 (July 18, 2006) (*en banc*).

As an initial matter, there is a question as to whether the Employer's Notice of Appeal was timely. The Notice of Denial was issued on February 5, 2015 and the Employer's appeal is not dated until February 20, 2015. The regulations are very clear that Employer only had five business days to perfect its appeal, or 12 calendar days to submit a modified application. *See* 20 C.F.R. § 655.142. Employer represented that she did appeal the Notice of Deficiency in a February 9, 2015 email, but she, nevertheless, provided scant information to support this claim. However, giving Employer all benefit of doubt, I will not dismiss this appeal for being untimely.¹⁰ Instead, I will address it on the merits.

Employer's appeal documents do not overcome at least two of the four deficiencies noted by the CO. First, Employer failed to submit the job order no fewer than 60 before and no more than 75 calendar days before the date of need. 20 C.F.R. 655.121(a). Employer filed the job order 59 days before the date of need. Fifty-nine days before the date of need does not comply with this requirement. Sixty days means sixty days. Employer attempted to correct this by asserting an emergency: "Mr. Anderson contacted me last minute because the Farm Labor contractor that was originally supposed to bring a crew to his farm had to cancel due to an emergency situation, which left me to submit this emergency petition for him to have workers and meet production." AF 8. However, Employer never explained the nature of the "emergency situation," which necessitated the waiver of this rigid requirement.¹¹

Of greater import, Employer's Application was deficient because it lacked a surety bond. Employer wrote that she "would like to assure your office ... [that] ... I will have the original surety bond before the time of need." AF 8. The CO is not permitted to approve a job order on the basis of an assurance alone. The regulations unequivocally require proof of a bond. 20 C.F.R. § 655.132(b)(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.**") (emphasis added).

Because the Employer failed to comply with the provisions of 20 C.F.R. §§ 655.121(a) and 655.132(b)(3), I hereby **AFFIRM** the CO's decision.

¹⁰ There is also an issue with the CO's notice of appeal rights as the CO did not notify the employer that "if the employer does not request an expedited administrative judicial review or a de novo hearing before an ALJ within 7 calendar days, the denial is final and the Department will not further consider that Application for Temporary Employment Certification." 20 C.F.R. § 655.164(c). *See* AF 4. *But see* AF 1.

¹¹ Further, the statement of need for the workers is dated January 19, 2015. AF 70. Employer signed the ETA 790 on Friday January 23, 2015 (AF 54), but did not submit the job order until Monday, January 26, 2015. *See, e.g.*, AF 13. Had Employer filed the job order, ETA 790, on the day of its signing, January 23, 2015, the Employer's request would have been timely, as it would have fallen within the fifteen day window for the submittal of job orders as set forth under § 655.121(a)(1).

SO ORDERED.

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey