



Issue Date: 04 May 2015 BALCA Case No.: 2015-TLC-00038

ETA Case No.: H-300-15057-212289

In the Matter of:

MIDWEST CONCRETE & REDI-MIX, INC.
Employer

Certifying Officer: William L. Carlson
Chicago National Processing Center

Appearances: Vincent C. Costantino, 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. 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. 20 C.F.R. § 655.115(a).

STATEMENT OF THE CASE

On February 26, 2015, the Certifying Officer (CO) received the Employer's Form ETA 9142 for eight farmworkers, laborers, crop workers, nurse workers, and greenhouse workers. (AF 61-91).¹ On March 5, 2015, the CO rejected the application and issued a Notice of Deficiency (NOD). The NOD declared that the Employer failed to provide executed work contracts for each business site, valid FLC certificates, and the original hard copy of its surety bond, in accordance with 20 C.F.R. § 655.132(b)(1)-(4) and 29 C.F.R. § 501.9. (AF 42-49).²

The Employer initially responded to the NOD on March 16, 2015, stating that contracts, a detailed itinerary, FLC paperwork, and the bond would be forthcoming. (AF 36-39). The

¹ 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.

² The NOD identified several other issues which are not the subject of this appeal.

Employer responded again on March 19, 2015, providing the executed work contracts and a work itinerary. (AF 13-35). On April 5, 2015, the Employer provided a copy of its surety bond by email. (AF 10-12).

On April 9, 2015, the CO denied the Employer's temporary labor certification application on three bases. First, the CO found that the work contracts did not corroborate with dates listed in the work itinerary and furthermore noted that the Employer's stated intent to submit additional work contracts violated the requirement in 20 C.F.R. § 655.132(b) that all documentation must be submitted at the time of filing. Second, the CO also determined that the Employer failed to provide FLC and FLCE Certificates of Registration, finding that proof of the Employer's pending applications did not satisfy the regulatory requirements. Third, the CO noted that the Employer failed to provide an original hard copy of its surety bond. (AF 4-9).

The Employer requested administrative review of the CO's denial on April 15, 2015. The Employer argued that the itinerary was drafted before the Employer had all the signed contracts and that the dates listed on the contracts were "overlooked." The Employer also stated that it submitted application requests to the FLC on February 23, 2015, and argued that it should not be penalized for the FLC's delay. The Employer further noted that it sent a hard copy of the surety bond to the National Processing Center on April 7, 2015. (AF 2-3).

On April 24, 2015, the Office of Administrative Law Judges received the Administrative File (AF) from the Certifying Officer (the CO). The parties were afforded three business days after receipt of the AF in which to submit briefs. The Employer has not filed a brief. The Office of the Solicitor filed a brief on behalf of the CO on April 28, 2015. The CO argued that the Employer did not dispute the facts on which the denial of certification was based, that the Employer's failure to obtain FLC certifications is detrimental, and that the Employer has yet to submit the original surety bond.

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). The ALJ may not consider any new evidence on appeal if the employer has requested administrative review. The standard of review is whether the CO's denial was arbitrary and capricious. *T.A.F. Shearing Co.*, 2012-TLC-00095 (Sep. 19, 2012).

In addition to the general filing requirements that the federal regulations impose upon all applicants for temporary labor certification under the H-2A program, employers classified as H-2ALCs must satisfy additional requirements set forth at 20 C.F.R. § 655.132. The relevant provisions of the Code of Federal Regulations provide as follows:

§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:

(1) The name and location of each fixed-site agricultural business to which the H-2ALC expects to provide H-2A workers, the expected beginning and ending dates when the H-2ALC will be providing the workers to each fixed site, and a description of the crops and activities the workers are expected to perform at such fixed site.

(2) A copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration, if required under MSPA at 29 U.S.C. 1801 *et seq.*, identifying the specific farm labor contracting activities the H-2ALC is authorized to perform as an FLC.

(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.

20 C.F.R. § 655.132(b)(1)-(4).

In this case, the Employer has not satisfied the additional filing requirements imposed on H-2ALCs under 20 C.F.R. § 655.132(b)(1), (4). The Employer has indicated the requested H-2A workers would be providing labor at sites owned by other entities. However, while the Employer provided an itinerary of work dates for these entities, the work contracts indicate contrary dates of employment. The Employer explained that it prepared the itinerary prior to receiving the contracts and simply overlooked the discrepancies between the documents. The regulations require the Employer to identify the expected beginning and ending dates of employment at each fixed site. The Employer's submission of contradictory dates fails to satisfy these regulatory requirements.

Moreover, the Employer also has failed to include with its application proof of a surety bond as required by 20 C.F.R. § 655.132(b)(3) or of FLC certification as required by § 655.132(b)(2). The Employer indicated that it applied for the FLC certification but received no response. This explanation, however, does not excuse the Employer from its responsibility to include the FLC Certification in their original application. The Employer further argues that it mailed the original hard copy surety bond on April 7, 2015, after receiving the NOD. However, this statement is not sufficient to comply with the regulatory requirement of providing the surety bond with the labor application. The regulations require the surety bond and FLC Certification at

the time the temporary labor application is made. 20 C.F.R. § 655.132(b)(2)-(3). Employer failed to do so.

The Employer failed to provide the requisite information and documentation at the time of application and failed to remedy those deficiencies. Therefore, the CO acted within his discretion when he denied certification for the Employer's failure to comply with 20 C.F.R. § 655.132(b)(1)-(4).

ORDER

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

SO ORDERED.

For the Board:

LARRY W. PRICE
Administrative Law Judge