



Issue Date: 17 August 2015

BALCA Case No.: 2015-TLC-00063

ETA Case No.: H-300-15148-955660

In the Matter of

PATOUT EQUIPMENT CO.,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

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 “DOL”) at 20 C.F.R. Part 655, Subpart B. The Employer timely filed a request for expedited administrative review of the Certifying Officer’s denial of temporary labor certification. This Decision and Order is based on the written record, consisting of the Appeal File (“AF”) forwarded by the Employment and Training Administration, and the written submissions of the parties.

BACKGROUND

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)(A).

On May 28, 2015, the DOL’s Employment and Training Administration (“ETA”) received an *Application for Temporary Employment Certification* from Patout Equipment Company (“PEC” or “Employer”). (AF 117-26).¹ PEC requested temporary labor certification for 280 Agricultural Equipment Operators from August 1, 2015 to January 31, 2016, based on a temporary seasonal need. (AF 117). On June 2, 2015, Employer provided, upon the CO’s request, an addendum to its application identifying all its worksites. (AF 97-104). PEC

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

identified 32 worksites and stated that “[a]ll worksites are controlled by employer for purposes of harvesting and hauling sugarcane during seasonal need.” (AF 104).

On June 2, 2015, the CO issued a Notice of Acceptance, informing PEC that its application had been accepted for processing, and instructed that PEC commence recruitment for the positions. (AF 91-96). PEC provided recruitment documentation on June 8, 2015. (AF 86-90).

On June 24, 2015, the CO issued a Notice of Required Modification. (AF 81-85). The CO stated that he had obtained outside information that PEC provides harvesting and transportation contract services to sugar cane growers,² and he was uncertain whether PEC met the definition of “fixed-site employer” as defined by section 655.103(b), or instead was an H-2A Labor Contractor (“H-2ALC”). The CO instructed that if PEC is an H-2ALC, it must provide all the documentation and information required by section 655.132(b) for H-2ALCs. Alternatively, the CO directed that if PEC is a fixed-site employer, it must provide “an attestation that it does indeed own[] and/or operate[] all the worksites on [its application] and is not providing harvesting and transportation contract services to independent sugar cane growers for any money or other valuable consideration paid or promised to be paid.” (AF 84).

On July 1, 2015, PEC responded to the Required Modification, stating that it is the fixed-site employer on the worksites listed on its application. (AF 70). PEC provided an attestation signed by its General Manager, which stated:

[PEC] is the only employer located on the worksites listed during the time of employment under this labor certification. Employer is given control of the worksites as the only employer on the worksite per a signed Worksite Release form signed between [PEC] and the owner of the worksite location. Employer operates all worksites listed on [the application] and is not providing harvesting and transportation contract services to independent sugar cane growers.

(AF 72).

On July 7, 2015, the CO requested a copy of the Worksite Release forms signed by PEC and the owners of the worksite locations. (AF 69). On July 10, 2015, PEC provided the requested Worksite Releases for all of the identified worksites except two worksites that are

² CO visited PEC’s website, which described its company as “provid[ing] harvesting and transportation contract services to sugar cane growers” and “assist[ing] independent growers in harvesting and transporting sugar cane.” (AF 144).

Upon inquiry by the CO, the State Workforce Agency (“SWA”) explained PEC’s business as follows:

To the best of my understanding, [PEC] provides harvesting and driving services to other farmers. The H-2A workers are employees of [PEC] but will perform the work at various farm sites. As I understand it, [PEC] employees pick up and deliver the harvests of various farmers to the sugar mill. I am uncertain whether they do this on a contract basis or simply charge a per unit fee.

(AF 77).

owned by PEC. (AF 17-66). In its response, PEC stated that “the owner of the worksite, ‘producer’ or ‘grower’ cultivates and grows sugarcane and may perform ancillary duties during the fall and winter, but per the attached worksite release forms, releases control of the worksite to Employer . . . to harvest and haul the sugarcane.” (AF 17).

On July 15, 2015, the CO stated that “[b]ased on the information provided, it is unclear if the employer merely has permission to work on the growers land or truly operates the farms” and directed PEC to “clarify to what extent, if any, the growers retain a financial interest in the harvested crops” and “provide documentation which establishes that it operates the farms so as to qualify as a fixed site employer.” (AF 15-16).

PEC responded on July 23, 2015, providing a signed statement from the Employer and a signed statement from Carrie Castille, Associate Commissioner of the Louisiana Department of Agriculture and Forestry. (AF 9-13). Employer’s letter stated that “PEC employs its workers both at its owned worksite locations . . . as well as on separate worksites . . . for which [] PEC has signed worksite releases for operation of those farms, in conjunction with its own agricultural operation.” (AF 13). Employer’s letter also stated that it is an operator of the worksite in order to perform the harvesting duties and retains 37% of the sugar it harvests on those worksites. (AF 13). The letter from Ms. Castille states that PEC’s retention of 37% of the sugar it harvests on the worksites is within the norm of 35% to 40% for sugarcane mills in Louisiana. (AF 12). She stated: “It is common practice that, in conjunction with its operation, an employer such as [PEC], with ownership in a sugar mill, will operate as an employer on multiple farms in the area during sugarcane harvest in order to actually operate and harvest the sugarcane on those farms that release their worksite to [PEC] for that reason.” (AF 12). She stated that PEC is an operator on the worksite farms in order to perform the harvesting duties. (AF 12).

On July 29, 2015, the CO denied PEC’s application because it failed to establish that it is a fixed-site employer, and did not provide the required documents as outlined in 20 C.F.R. § 655.132(b) for H-2ALC applicants. (AF 2-8). The CO stated that “all employers working on a given parcel of land have permission to operate on that land, but do not necessarily then become ‘operators’ for purposes of the H-2A program.” (AF 6). The CO noted that a lease may be sufficient to establish it is an operator but no such evidence was presented by PEC. (AF 6). The CO further found that PEC’s fee of 37% of the crop is “the very essence of a Farm Labor Contractor to harvest another’s commodities for a fee.” (AF 7).

On August 4, 2015, PEC appealed the CO’s denial to the Office of Administrative Law Judges (“OALJ”), and on August 10, 2015, I issued a Briefing Order. (AF 1).

PEC and the CO filed briefs on August 16, 2015. PEC argued in its brief that the DOL “failed to satisfy statutory requirements and procedural prerequisites” and the CO’s finding that it was an H-2ACL is arbitrary and capricious and not supported by the evidence in record. The CO in his brief urged affirmance of the denial, arguing that the Worksite Releases were insufficient to establish PEC was an operator of the worksites identified, and the financial arrangements between the parties establishes PEC is an H-2ACL. PEC filed a reply brief on August 16, 2015, distinguishing case law relied upon by the CO in his brief.

DISCUSSION

Scope of Review

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.” Accordingly, an employer may not refer to any evidence that was not a part of the record before the CO. PEC submitted with its brief the Employer’s Guide to Participation in the H-2A Temporary Agricultural Program. As this new evidence was not a part of the record before the CO, I am unable to consider it in my review.

Procedural Issues

PEC in its brief raised several procedural issues, which it asserts warrant a reversal of the denial of certification in this matter.

PEC first argues that by issuing a Notice of Acceptance of PEC’s application, the CO had determined there were no deficiencies with the application and was bound to certify the application if the criteria for certification in 20 C.F.R. § 655.161 were met. (Er. Br. 5-7). The Notice of Acceptance merely stated that the application was accepted for processing, and directed that a decision to deny or grant certification would occur a later date. (AF 91, 96). After issuing the Notice of Acceptance, it came to the CO’s attention that PEC may not have met the requirements of Part 655, Subpart B. Ultimately, the CO properly denied certification pursuant to 20 C.F.R. § 655.161 because PEC had not met the regulatory requirements.

Next PEC argues that approval was mandatory because none of the statutory conditions for denial of H-2A labor certifications as set forth under 8 U.S.C. § 1188(b) were present. The Secretary of the Department of Labor was given the authority under 8 U.S.C. § 1188 to issue regulations to acquire information sufficient to make factual determinations of whether H-2A Temporary Labor Certifications should be granted. 20 C.F.R. § 655.100. Under section 655.161 of the regulations promulgated, “Criteria for certification,” a CO can deny certification if an employer has not complied with all the requirements of Part 655, Subpart B. Here, the CO properly denied certification because the Employer did not meet the regulatory definition of fixed-site employer under section 655.103(b), and failed to meet the requirements for H-2ALC applicants under section 655.132.

Lastly, PEC argues it never received a timely Notice of Deficiency or a timely Final Determination under the regulations and was therefore unduly prejudiced as it was unable to obtain labor before its start date for the seasonal need. (Er. Br. 9-11). Under the statute and the implementing regulations, the CO must issue a notice of deficiency within 7 days of the receipt of the employer’s application, and must issue a final determination no later than 30 days before the date of need identified in the employer’s application. 20 C.F.R. §§ 655.141(a), 655.160; 8 U.S.C. §§ 1188(c)(2)-(3). PEC submitted its application on May 28, 2015, but the CO’s Notice

of Modification was not issued until June 24, 2015.³ The CO's Denial was issued on July 29, 2015, only 3 days before the date of need, August 1, 2015, identified on PEC's application. While both the CO's Notice of Modification and Denial were not timely under the statutory and regulatory scheme, I do not find this demands a reversal based on untimeliness. The statute and the regulations do not provide a consequence for the CO's failure to meet applicable deadlines, and therefore do not prevent the CO from acting outside the timeframe. *See Int'l Labor Mgmt., Corp. v. Perez*, Civ. No. 1:14-CV-231, 2014-LEXIS-57803 at *18-22 (M.D.N.C. 2014).

The CO's delay in processing the instant application was because he discovered new information after the notice of acceptance and required time to gather additional information to ensure that the application was accurate and complied with the regulations. The Employer had full notice of the reasons for the application's deficiency as of June 24, 2015, and had opportunities to respond to the deficiency. There is no prejudice to the Employer as a result of the delay, as I find below that the application was properly denied on the merits. Therefore, although the CO's Notice of Modification and Denial were untimely, I find this does not warrant reversal on due process grounds.

Status as a Fixed-Site Employer

At issue in the instant appeal is whether PEC qualifies as a fixed-site employer, or rather is an H-2ALC, which would require additional documentation and information from PEC not provided with its application. *See* 20 C.F.R. § 655.132. A fixed-site employer is defined under the regulations as:

Any person engaged in agriculture who meets the definition of an employer⁴ . . . who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed and who recruits, solicits, hires, employs, houses, or transports any worker . . . as incident to or in conjunction with the owner's or operator's own agricultural operation.

20 C.F.R. § 655.103(b) (emphasis added). An H-2A Labor Contractor ("H-2ALC") is defined as:

Any person who meets the definition of employer . . . and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association . . . who recruits, solicits, hires, employs, furnishes,

³ I find the CO's Notice of Modification Required was the equivalent of a Notice of Deficiency, as it contained all the required information for notices of deficiencies set forth in 20 C.F.R. § 655.141.

⁴ An employer is defined under the regulations as a person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that: (1) has a place of business in the U.S. and a means by which it may be contacted for employment; (2) an employer relationship with respect to an H-2A worker or a worker in corresponding employment; and (3) possesses a valid Federal Employer Identification Number ("FEIN"). 20 C.F.R. § 655.103(b).

houses, or transports any workers subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

20 C.F.R. § 655.103(b). The definition of an H-2ALC “broadly encompasses employers who seek to participate in the H-2A program, but do not fit the definition of a fixed-site employer.” Employment and Training Administration, U. S. Department of Labor, comments to Final Rule implementing 20 C.F.R. Part 655, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6884, 6886 (Feb. 12, 2010).

As stated by the CO, whether PEC is a fixed-site employer hinges on whether it owns or operates the farms identified as worksites. *See* 20 C.F.R. § 655.103(b). PEC owns two of its identified worksites, but not the remaining 30 sites. Therefore, PEC must establish that it is the operator of these additional worksites in order to be deemed a fixed-site employer.

PEC relies primarily on its Worksite Releases to establish it operates the listed worksites. The Worksite Releases state: “The Producer agrees to *release control* of his worksite to PEC *for the harvesting and hauling of the sugarcane* grown by the Producer,” for the duration of the harvest season. (*See, e.g., AF 37*) (emphasis added). Based on the plain language of these releases, PEC is granted control for the specific purpose of harvesting and hauling the sugarcane; the releases do not state that PEC has blanket control over the day to day operations of the farm. Similarly, the letter from Carrie Castille, the Associate Commissioner of the Louisiana Department of Agriculture and Forestry, stated PEC “is an operator on the farm *in order to perform the actual harvesting duties.*” (AF 12) (emphasis added).

PEC acknowledged that the owners of the worksites cultivate and grow the sugarcane and “*perform ancillary duties during the fall and winter*” while PEC is harvesting the sugarcane. (AF 17). PEC therefore does not have full control over the farm, but rather is limited in operation to the harvesting and hauling processes. (AF 17). Additionally, PEC’s own website describes its company as “*provid[ing] harvesting and transportation contract services to sugar cane growers.*” (AF 144) (emphasis added). PEC’s comment in its brief that “marketing statements on [its] website are not necessarily outcome determinative” is unpersuasive. (Er. Br. 17).⁵

The CO aptly pointed out while an H-2ALC may be permitted to operate on the land, in this case to perform PEC’s harvesting business, it does not necessarily mean that the H-2ALC becomes an operator of the farm for purposes of the H-2A program. (AF 5; CO Br. 5).

A review of prior TLC decisions shows the following businesses have not qualified as fixed-site employers: a silage chopping and manure spreading business to service other farms; a crop dusting business to service other farms; transporting citrus from farms to processing plants; transporting grain from farms to a storage facility and maintenance of machinery; handling

⁵ The marketing pronouncement on PEC’s website is also in direct conflict with the attestation filed by PEC’s General Manager that: “Employer... is not providing harvesting and transportation contract services to independent sugar cane growers.” (AF 72). Either PEC’s General Manager filed a false attestation in this proceeding or it is making false statements to sugar cane farmers via its website.

sprinklers and irrigation for farm fields; and providing workers to plant sugarcane at various fixed-site farms. See *McClure Custom Plumbing, LLC*, 2015-TLC-00022, PDF at 4 (Mar. 24, 2015); *Scott Aviation, Inc.*, 2011-TLC-00409, PDF at 2-3 (June 7, 2011); *Desoto Fruit and Harvesting, Inc.*, 2012-TLC-00097, PDF at 3 (Sept. 26, 2012); *Altendorf Transport, Inc.*, 2013-TLC-00026 at 5 (Mar. 28, 2013); *Lorenzo Gabriel Marquez*, 2013-TLC-00009, PDF at 3 (Nov. 29, 2012); *Lowry Farms*, 2013-TLC-00040, PDF at 2 (July 2, 2013). In *Lorenzo Gabriel Marquez*, the ALJ found that the employer did not “provide a lease contract or any other evidence that could demonstrate the extent and nature of the Employer’s control over the worksite, aside from a bare assertion that the Employer directs and controls its own employees and worksite independently of the worksite owner.” 2013-TLC-00009 at 3. The ALJ concluded that based on the employer’s business of handling sprinklers and irrigation for farm fields, the employer did not operate the farm, but merely provided services to fixed-site farmers. *Id.*

Similar to the cases above, PEC does not operate the worksites listed in its application; it merely provides a service, harvesting and hauling of sugarcane, to farmers at specific locations, and therefore does not qualify as a fixed-site employer under the regulations.⁶ While unlike *Lorenzo Gabriel Marquez*, PEC did provide some evidence of control, namely the Worksite Releases, for the reasons discussed above, these releases were insufficient to establish PEC was the operator of the farms.⁷

Because PEC has failed to establish it is a fixed-site employer under the regulations, and has not met the requirements for an H-2ACL application under section 655.132, it has not met its burden of establishing it is entitled to labor certification. See *Garrison Bay Honey Co., LLC*, 2011-TLC-00054 (Dec. 2, 2010). Accordingly, the CO’s denial of certification is hereby affirmed.

⁶ PEC in its brief argues that because the CO has granted labor certification to PEC in the recent past as a fixed-site employer, he cannot now deny its application on the basis that it is an H-2ACL. (Er. Br. 2-3, 11-13). The CO’s Notice of Required Modification adequately explained that the reason for the change in the present application was that the CO recently received new information (i.e. information from the SWA and PEC’s website) suggesting that PEC was not, in fact, a fixed-site employer. (AF 77). The CO’s denial was not arbitrary and capricious as it was based on new information received in the context of this application. Applications are processed on a case by case basis, and simply because PEC was found to be a fixed site employer in one application not does grant it permanent status as a fixed-site employer in all future cases.

⁷ The CO also relies substantially on the fact that PEC retains 37% of the sugar it harvests in finding PEC is an H-2ACL and not a fixed-site employer. While I find that fee arrangements are more of a determinative factor under the MSPA definition of a Farm Labor Contractor, rather than under the H-2A program’s definition of a fixed-site employer, I agree with the CO that PEC’s retention of a portion of the sugar it harvests tends to suggest PEC provides contractual services in exchange for a fee, rather than operates as a fixed-site employer on the identified worksites.

ORDER

In light of the foregoing discussion, it is hereby ORDERED that the Certifying Officer's decision denying the above-captioned H-2A temporary labor certification matter is **AFFIRMED**.

SO ORDERED.

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts