



**Issue Date: 11 May 2015**

**CASE NO.: 2015-TLC-00046**

**ETA CASE NO.: H-300-15091-367748**

*In the Matter of:*

**QUARTER CIRCLE 13 RANCHES,**  
*Employer*

Certifying Officer: Charlene G. Giles  
Chicago National Processing Center

Before: **PATRICK M. ROSENOW**  
Administrative Law Judge

## **DECISION AND ORDER**

This matter involves a request for certification of non-immigrant foreign workers (H-2A workers) for temporary or seasonal agricultural employment under the Immigration and Nationality Act (INA), as amended,<sup>1</sup> and the implementing regulations promulgated by the Department of Labor.<sup>2</sup> This Decision and Order is based on the written record, consisting of the Appeal File (“AF”) forwarded by the Employment and Training Administration. Since Employer requested an expedited administrative review, I considered only the evidence that was before the Certifying Officer (“CO”), with no new evidence submitted on appeal.<sup>3</sup> In expedited administrative review cases, the administrative law judge has five working days after receiving the AF to issue a decision on the basis of the written record.<sup>4</sup> The AF for this case was received on 5 May 15.

## **BACKGROUND AND LAW**

On 12 Feb 15 and 18 Feb 15, respectively, Employer filed ETA Form 790 and Form ETA 9142A requesting temporary labor certification for the position “Farmworkers, Farm, Ranch, and Aquacultural Animals.”<sup>5</sup> The period of intended employment was to begin on 1 May 15.<sup>6</sup>

---

<sup>1</sup> 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

<sup>2</sup> 20 C.F.R. Part 655, Subpart B.

<sup>3</sup> The Solicitor offered the CO’s position statement on 7 May 15.

<sup>4</sup> 20 C.F.R. § 655.171(a).

<sup>5</sup> The CO called the position by this name. Employer called it “Sheepherder.”

<sup>6</sup> AF 74-88.

The CO issued a Notice of Deficiency on 7 Apr 15, notifying Employer of six deficiencies in its application: (1) it filed its application less than 45 days prior to its date of need without providing a statement justifying good and substantial cause; (2) it failed to include the complete job order number in Section H, Item 2 of the ETA Form 9142A; (3) it failed to clarify the pay period in which workers will be paid; (4) it mistakenly filled out Section J of the ETA Form 9142A; (5) it listed in Item 19 of the ETA Form 790 that it will reimburse the workers \$11.58 per day for travel subsistence while the regulations<sup>7</sup> require reimbursement of at least a minimum of \$11.86 per day; and (6) it failed to submit a valid workers' compensation policy.<sup>8</sup>

On 14 Apr 15, Employer sent the CO an email with the subject line "NOD Response." On 16 Apr 15, the CO responded to Employer that none of the attached documents were relevant to the deficiencies noted in the Notice of Deficiency. On 22 Apr 15, Employer sent the CO another email addressing the Notice of Deficiency, but the CO responded later that day that the attachment to the email could not be opened to view the content and provided Employer with alternative methods to submit its Notice of Deficiency response. Again on 22 Apr 15, Employer responded to the CO with attachment addressing the Notice of Deficiency.<sup>9</sup>

The CO issued the Notice of Denial on 24 Apr 15 because Employer failed to provide a response addressing the six deficiencies in the Notice of Deficiency.<sup>10</sup>

Throughout the labor certification process, the burden of proof in alien certification remains with Employer.<sup>11</sup> When conducting an administrative review, the presiding Administrative Law Judge ("ALJ") is to 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..."<sup>12</sup> Accordingly, an ALJ may not refer to any evidence that was not a part of the record as it appeared before the CO.

## DISCUSSION

Employer's appeal of the CO's Notice of Denial is timely. The CO provided Employer multiple opportunities to address the six deficiencies including an email on 16 Apr 15 and on 22 Apr 15.<sup>13</sup> In its email responses to the Notice of Deficiency, Employer attached an I-29 verification form, visa identification card, and a form from USCIS approving H-2A status for

---

<sup>7</sup> 20 C.F.R. § 655.173(a).

<sup>8</sup> AF 52-57.

<sup>9</sup> AF 32-51.

<sup>10</sup> AF 26-31. In the AF there is a letter and attachments dated 14 Apr 15 sent by Employer to the CO accurately addressing all six deficiencies in the NOD. However, the FedEx shipping label for these documents is dated 30 Apr 15. When the CO issued its Notice of Denial on 24 Apr 15, she did not possess these documents. AF 8-25; CO's Position Statement, p.2.

<sup>11</sup> *Altendorf Transport, Inc.*, 2011-TLC-158, slip op. at 13 (Feb. 15, 2011).

<sup>12</sup> 20 C.F.R. §655.171(a).

<sup>13</sup> The 16 Apr 15 email from the CO directly addressed that the attachments in Employer's 14 Apr 15 email did not contain a response to the Notice of Deficiency nor any documentation regarding any noted deficiencies in the Notice of Deficiencies. AF 42. The 22 Apr 15 email from the CO responded to Employer that its response to the deficiencies could either be attached in the email either by Word document or PDF document. Additionally, the CO provided Employer with two fax numbers or the option to send by regular mail. AF 41.

Employer on behalf of Sabino Santos. None of these documents in any way addressed the Notice of Deficiencies.

Employer's request for Appeal included a letter and attachments sent to the CO that properly addressed the six deficiencies. Although the letter is dated 14 Apr 15, the FedEx mail receipt is dated 30 Apr 15. Accordingly, Employer may have drafted the letter and corrected the deficiencies prior to the issuance of the Notice of Denial, but the CO never had possession of the information until at least 30 Apr 15 and thus could not consider it when she made her determination. In her position statement, the CO affirmed that the information submitted with Employer's appeal letter was not part of the record upon which her determination was based. I find it more likely than not that the CO did not possess the relevant evidence addressing the six deficiencies when she issued her Notice of Denial and accordingly, I find Employer did not meet its burden.<sup>14</sup>

Therefore, since the documents Employer sent to the CO *prior to* the date of denial were irrelevant to the six deficiencies and Employer's application remained in violation of the regulations, the CO properly denied certification. Employer's subsequent corrective steps do not retroactively correct the deficiencies and invalidate the denial.<sup>15</sup>

### **ORDER**

Based on the foregoing, it is hereby ordered that the Certifying Officer's decision is **AFFIRMED**.

**ORDERED** this 11<sup>th</sup> day of May, 2015, at Covington, Louisiana.

**PATRICK M. ROSENOW**  
**Administrative Law Judge**

---

<sup>14</sup> The regulations do not permit me to consider new evidence on appeal. I can only consider the record as it was before the CO and in this case, the record did not include the letter and attachments Employer sent to the CO on 30 Apr 15.

<sup>15</sup> The labor certification procedure is a streamlined process which does not allow for continued back and forth between the CO and Employer making corrections noted in the Notice of Deficiencies. The regulatory scheme often sacrifices equity at the expense of efficiency. Employers are encouraged to ensure their responses to a Notice of Deficiency are timely, accurate, and complete. This employer's attachment of the new and correct ETA Forms and proof of workers' compensation insurance to its appeal letter is evidence of its good faith, but the regulations are not concerned with motive or intent. The burden is on employers to submit error free documents in order to save agency resources in post application corrections and in this case Employer had multiple opportunities to do correct their application prior to the CO's Notice of Denial. *HealthAmerica*, 2006-PER-1 (July 18, 2006) (*en banc*).