



Issue Date: 11 March 2016

In the Matter of:

Carlson Orchards, Inc.,
Employer.

CASE NO: 2016-TLC-00025
ETA CASE NO: H-300-16040-934955

Before: **Daniel F. Solomon**
Administrative Law Judge

DECISION AND ORDER

Carlson Orchards, Inc. (“Employer”) appeals the Certifying Officer’s (“CO”) denial of the above-captioned application for H-2A temporary labor certification. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188 and the implementing regulations promulgated by the U.S. Department of Labor (“DOL” or “Department”), Employment and Training Administration (“ETA”) at 20 C.F.R. Part 655.¹ For the reasons set forth below, the Certifying Officer’s denial is **AFFIRMED**.

STATEMENT OF THE CASE

On February 9, 2016, ETA received the Employer’s application for temporary labor certification. AF 26.² In particular, the Employer requested certification for two Farmworkers and Laborers, Crop, Nursery, and Greenhouse job opportunities.

On February 16, 2016, the CO issued a Notice of Deficiency (“NOD”) requesting further information on temporary need. AF 8-11. The CO noted that ETA Form 9142 and ETA Form 790 indicate the employer’s dates of need are from 04/01/2016 through 12/10/2016; however, the employer’s previous certification was for 06/01/2015 through 12/15/2015. AF 10. Based on this information, the CO noted that it was unclear how this job opportunity is temporary or seasonal in nature.

On March 1, 2016, the CO denied the application because the Employer failed to submit a modified application within twelve calendar days after the Notice of Deficiency was issued or request an expedited administrative appeal or a de novo hearing.

¹ The H-2A nonimmigrant visa program enables agricultural employers in the United States to import foreign workers on a temporary basis to perform temporary, agricultural labor or services. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1), 1188. Employers who seek to hire H-2A nonimmigrant workers must first apply for and receive a “temporary labor certification” from ETA. 8 U.S.C. 1188(a)(1).

² Citations to the 87 page Administrative File will be abbreviated “AF” followed by the page number.

On March 1, 2016, Employer requested expedited a de novo hearing by the Office of Administrative Law Judges.

DISCUSSION

Employer argues that it prepared a letter in response to the NOD but that its filing agent failed to convey the letter. Employer's Brief pg. 2. Employer also stated:

Petitioner acknowledges that this Court has dismissed appeals in the past with this particular procedural context, *i.e.*, appeal from a notice of denial where no NOD response was submitted, nor an appeal lodged from the NOD within 5 days thereafter. *See In re Rodrigo Gutierrez-Tapia*, 2013-TLC-00036 (June 14, 2013) (granting Solicitor's motion to dismiss appeal); *In re International Easy Labor, Inc.*, 2013-TLC-00032 (June 4, 2013) (affirming CO's denial); *In re JBO Harvesting, Inc.*, 2011-TLC-00023 (Nov. 4, 2010) (dismissing appeal). In light of this, however, Petitioner urges this Court to consider this appeal as a matter of equity and to remand the application to the CO for further processing.

Employer's Brief, pg. 2. Employer points to cases in the PERM context in which employers have successfully demonstrated equitable grounds for reversing a CO's denial. The two cases were authored by Judge Vittone and held that errors of an employer's agent or attorney should not be grounds to punish the employer. *See In re Nivek Painting, Inc.*, 2004-INA-301 (Aug. 24, 2005); *In re Kaname Japanese Restaurant*, 2004-INA-298 (Aug. 24, 2005).

The CO argues that the Employer is foreclosed from pursuing an appeal. The NOD stated:

As provided by Departmental regulations at 20 CFR § 655.142(c), you have the opportunity to request an expedited administrative review of the Notice of Deficiency or a de novo hearing of the Notice of Deficiency before an Administrative Law Judge. To obtain this review or de novo hearing, you must file within five (5) business days from the date of receipt of this notice by facsimile or other means normally assuring next day delivery, a written request for such a review or hearing to the Chief Administrative Law Judge, U.S. Department of Labor, 800 K Street NW, Suite 400-N, Washington, DC 20001-8002, with a simultaneous copy to this office. You may submit any legal arguments that you believe will rebut the basis of the Certifying Officer's actions.

The CO argues that the Employer was notified that it could modify its application with the requested information within five business days of its receipt of the NOD. 20 C.F.R. § 655.142. AF 8. The NOD also noted that the "application will be deemed abandoned if the employer does not submit a modified application within 12 calendar days after the Notice of Deficiency was

issued.” Id. The regulations also state that if the employer does not submit a modified application or request an expedited administrative review or a de novo hearing before an ALJ within five business days the CO will deny the application and “that denial is final cannot be appealed and the Department will not further consider that Application for Temporary Employment Certification.” 20 C.F.R. § 655.141(b)(5)

Judge Vittone’s decisions do not constitute precedent in this case. Employer has acknowledged the procedural flaws in this case but “humbly asks me to consider the equities and show mercy in overlooking those flaws and allowing the application to be considered on its merits.”

I find that although I am sympathetic, Employer has not alleged any facts that would give rise to equitable tolling. I also do not have any equitable basis to remand this claim. Employer is not barred from refileing.

Moreover, the CO’s March 1, 2016 denial, as argued by the CO, does not give the Employer new appeal rights. The failure of the Employer to timely appeal the NOD or submit a modified application mandates dismissal of this appeal because I do not have jurisdiction over this matter.

ORDER

In light of the foregoing, it is hereby **ORDERED** that this case is dismissed.

**DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE**