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Issue Date: 08 March 2016

OALJ Case No.: 2016-TLC-00021

ETA Case No.: H-300-16040-388493

In the Matter of

**JAMES W. MCKENZIE JR. and
JAMES W. MCKENZIE SR.,**
Employer

Certifying Officer: Charlene G. Giles, Director
Chicago National Processing Center

Appearances: Andrew M. Jackson, Esq.
Andrew Jackson Law
For the Employer

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Office of the Solicitor
Washington, DC
For the Certifying Officer

Before: **PAUL C. JOHNSON, JR.**
District Chief Administrative Law Judge

**DECISION AND ORDER AFFIRMING CERTIFYING OFFICER'S DENIAL OF
TEMPORARY LABOR CERTIFICATION**

This matter arises under the temporary labor certification provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184 (a) and (c), and 1188 (“the Act”), and the implementing regulations at 20 C.F.R. Part 655, Subpart B (“the regulations”). In this case, James W. McKenzie Jr. and James W. McKenzie Sr. (“Employer”) filed a timely request for expedited administrative review of the Certifying Officer’s (“CO”) February 16, 2016 notice of deficiency (“NOD”) of Employer’s application for temporary agricultural labor certification under the H-2A non-immigrant program. The H-2A program permits employers to hire foreign workers to perform temporary agricultural work within the United States on a one-time occurrence, seasonal, peak-load, or intermittent basis. Following the CO’s issuance of a NOD under 20 C.F.R. § 655.141, an employer may request administrative review by the Board of

Alien Labor Certification Appeals (“BALCA” or “the Board”). 20 C.F.R. § 655.171(a). As this case involves an administrative review, the Board may not consider any new evidence. 20 C.F.R. § 655.171(a). The following Decision and Order is based on a review of the entire administrative file, including Employer’s request for review and the written arguments.

STATEMENT OF THE CASE

On February 9, 2016, the United States Department of Labor (“the Department”), Employment and Training Administration (“ETA”), received Employer’s ETA Form 9142 Application for Temporary Employment Certification (“Application”). (AF 41–58).¹ In the Application, Employer requested H-2A labor certification for eight seasonal workers to serve as “Farmworkers and Laborers, Crop, Nursey, and Greenhouse” from April 9, 2016 until October 28, 2016. (AF 41). The Application described the following job duties:

Pull weeds/chop. Workers will walk along rows as specified by employer and remove weeds and grass from fields by hand or using a hoe. Transplant and cultivate sweet potato. Cultivate and harvest flue-cured tobacco. Load and unload flue-cured tobacco, baled hay or straw. Prolonged walking, standing, bending, stooping, and reaching. Job is outdoors and continues in all types of weather. Workers may be requested to submit to random drug or alcohol tests at no costs to the worker. Failure to comply with the request or testing positive may result in immediate termination. All testing will occur post-hire and is not a part of the interview process. Must be able to lift 75 lbs. to shoulder height repetitively throughout the workday and able to lift and carry 75 lbs. in field.

(AF 43). No education or training requirements were listed, but applicants were expected to have at least one month of verifiable farmworker experience in the crop activities listed. (AF 44, 56). The worksite address was listed as 1112 Long Branch Road, Smithfield, North Carolina. (AF 44).

The Event History Details recorded by analysts at ETA show that when the Application was submitted on February 9, 2016, ETA found deniable items in the Application and that a business verification failed. (AF 31). On February 16, 2016, the CO issued a NOD and found the Employer’s application failed to meet the criteria for acceptance for two reasons. (AF 26–29). First, Employer failed to provide evidence of its Federal Employer Identification Numbers (“FEIN”) pursuant to 20 C.F.R. § 655.103(b). (AF 28). Second, Employer submitted duplicate signed Appendix A.2 documents to the ETA Form 9142 for James W. McKenzie Sr., but did not submit an Appendix A.2. for James W. McKenzie Jr. as required by 20 C.F.R. § 655.141(a). (AF 28). Further, Employer did not submit Sections C and D of the ETA Form 9142 for James W. McKenzie Sr. as required by 20 C.F.R. § 655.141(a). (AF 29). The CO instructed Employer to provide evidence of the FEINs in the form of a “documents from an official source, e.g. the State, or tax documents from the IRS” to remedy the first deficiency, and to provide the correct Appendix A.2 and Sections C and D of the ETA Form 9142 to remedy the second deficiency. (AF 28–29).

¹ Citations to the Appeal File in this case will be abbreviated “AF” followed by the page number(s).

On February 17, 2016, Employer filed a response to the NOD. (AF 15–25). The response included Appendix A.2 forms and Sections C and D of the ETA Form 9142 to correct the second deficiency. (AF 19–25). Employer provided proof of the FEINs in the form of two IRS Forms 943s, Employer’s Annual Federal Tax Return for Agricultural Employees. (AF 17–18). The Case Notes recorded at ETA indicate all the documents were received, but that Employer failed to provide valid documents for FEIN verification. (AF 32).

On February 22, 2016, the CO issued an email notifying Employer that the FEIN documentation was deficient and prevented further processing of the Application. (AF 10). The CO found the FEIN documentation provided “did not originate from an official source,” and stated that “IRS documents filed [sic] out by the employer are unacceptable for the purpose of verifying [an employer’s FEIN].” (AF 10). The CO required Employer to provide evidence of FEIN numbers “specified on documents from official sources,” and gave Employer until February 24, 2016 to respond. (AF 10).

On the same day, February 22, 2016, Employer requested an expedited administrative review of the CO’s NOD. (AF 1–4). In an expedited administrative review case, the Administrative Law Judge has five business days after receipt of the Appeal File to issue a decision on the basis of the written record and written briefs, but not on the basis of any new evidence. *See* 20 C.F.R. § 655.171(a). The Appeal File in this case was received on March 2, 2016. The parties were directed to file any written briefs by Monday, March 7, 2016 at 4:30 p.m.

The Employer timely submitted a brief on March 7, 2016. The Solicitor timely submitted a brief on behalf of ETA. The Employer’s request for administrative review, the Appeal File, and the written arguments constitute the entire administrative file and were considered in deliberation.

EMPLOYER’S POSITION

In the request for administrative review, Employer noted that the second deficiency appeared to be resolved, and the only issue related to the FEIN documentation. (AF 3). Employer argued that although the regulations require an employer to possess a valid FEIN number, the regulations do not require extrinsic proof of the FEIN number. (AF 3). Employer argued its attestation of the FEIN numbers should be sufficient, but assuming *arguendo* that the CO is entitled to extrinsic proof, the documentation provided was sufficient. (AF 4). Employer also argued that the CO’s requirement that the FEIN documentation originate from an official source is without legal authority. (AF 4).

In its brief filed March 7, 2016, Employer reiterated that the regulations contain no explicit requirement for independent FEIN documentation. Employer argues the recent decision in *J and V Farms, LLC*, 2016-TLC-00022 (ALJ Mar. 4, 2016) is distinguishable because no corroborating documentation was submitted by the employer, and in this case, Employer submitted copies of recently filed tax returns showing the FEINs. Employer argued that the ETA’s requirement that the FEINs be shown on a document from an official government source is arbitrary and capricious, and the tax return documents are not “mere opinion letters.” (Employer’s Brief at 4). Employer also argues there is no evidence that the ETA attempted to re-

validate the FEINs after submission of evidence, and contends the case should be remanded to the CO for acceptance and processing.

ETA'S POSITION

In its brief filed March 7, 2016, the ETA argued that Employer's response to the NOD was deficient, as it first filed IRS Form 943s in response to the NOD, and then appealed the NOD to the Board after the CO requested documentation that originated from an official government source. The ETA argued that the CO was not able to verify whether Employer's FEINs were valid, and that the CO was within its rights of reasonable discretion to request independently verified documents or evidence. The ETA argued that employer-generated forms are not documents that substantiate facts, but documents that set forth an employer's opinion.

DISCUSSION

Pursuant to the regulations, if an application is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in the regulations, the CO must notify the employer of the deficiency within seven days of receiving the application. *See* 20 C.F.R. § 655.141(a). The employer has the opportunity to request an expedited administrative review of a NOD. *See* 8 U.S.C. § 1188(e)(1); 20 C.F.R. § 655.141(c), 171(a). An administrative review is based on the written record and any written submissions of the parties, and does not include any new evidence. *See* 20 C.F.R. § 655.171(a).

For purposes of the H-2A regulations, the definition of employer requires the employer to have a place of business, an employer relationship with respect to an H-2A worker, and an employer must possess a valid FEIN. *See* 20 C.F.R. § 655.103(b). The criteria for certification within the regulations require that an employer comply "with all of this subpart." 20 C.F.R. § 161(a) (emphasis added). Therefore, an applicant has not met the criteria for certification if a FEIN cannot be validated, because the applicant does not meet the regulatory definition of an employer. *See, e.g., Patout Equipment Co.*, Case No. 2015-TLC-00063, slip op. at 4 (ALJ Aug. 17, 2015) (finding that certification was properly denied because the employer did not meet the regulatory definition of a fixed-site employer); *see also Monte Kesity Farms*, 2010-TLC-00049, slip op. at 3 (ALJ July 12, 2010) (finding that certification was properly denied where employer did not submit adequate proof of workers' compensation insurance, and thus did not satisfy the regulatory requirements).

After a NOD is issued, an employer may cure any deficiencies through the submission of a modified application. *See* 20 C.F.R. §§ 655.141(b), 655.1300(a)(2). The CO has "reasonable discretion to request a document or information which has a direct bearing on the resolution of an issue concerning the application and is obtainable by reasonable efforts." *Carol Paul*, 2008-TLC-00025, slip op. at 3-4 (ALJ May 2, 2008) (citing *Gencorp*, Case No. 1987-INA-659 (BALCA Jan. 13, 1988) (en banc)).

In the request for administrative review, Employer argued that its individual attestations on the ETA Form 9142 are sufficient proof of the FEIN numbers. Throughout the alien certification process, the burden of proof remains with Employer. *See Henke Dairy, LLC*, 2016-

TLC-00003, slip op. at 3 (ALJ Oct. 30, 2015) (citations omitted). In the promulgation of the 2010 Final Rule, the Department noted concerns and the need to move away from an attestation-based model. *See* 75 Fed. Reg. 6883, 6945 (Feb. 12, 2010) (stating, “It has come to the Department’s attention that some employers, due to a lack of understanding or for other reasons, were attesting to compliance with program obligations with which they had not complied.”). Accordingly, it is reasonable for an employer to be required to submit additional evidence or proof to ensure compliance with the regulations. *See Lodoen Cattle Co.*, Case No. 2011-TLC-00109, slip op. at 5 (ALJ Jan. 7, 2011) (citing *Carlos Uy III*, Case No. 1997-INA-304, slip op. at 8 (BALCA Mar. 3, 1999) (en banc) (finding a statement or assertion that the grounds for certification are valid without supporting evidence does not satisfy an employer’s burden of proof).

Employer also argues that the regulations do not require extrinsic proof, but if proof is required, the submission of the IRS Form 943s are sufficient. As discussed, the CO has the discretion to request additional documents or information to resolve issues pertaining to the application. *See Carol Paul*, 2008-TLC-00025, slip op. at 3-4; *see also John Gosney*, 2012-TLC-00009, slip op. at 9–10 (ALJ Dec. 30, 2011). If Employer’s FEINs are valid, it is reasonable for the CO to require a document from an official source to corroborate the FEINs originally provided. In this case, the ETA attempted to verify Employer’s business, but the verification process failed. (AF 31). The ETA notified Employer of the deficiency, and specifically sought evidence of the Employer’s FEINs “on a document from an official source, e.g., the State, or tax documents from the IRS.” (AF 28) (emphasis added).

A similar issue arose in *J and V Farms, LLC*, 2016-TLC-00022 (March 4, 2016), and Administrative Law Judge Clark found that the CO must be able to verify the basic identifying information from an employer in order to ascertain whether that employer is entitled to participate in the H-2A program. 2016-TLC-00022, slip op. at 5. Further, Judge Clark noted that “[a]ssuming that Employer’s FEIN is in fact valid, it should be possible to provide an official corroborating source without unreasonable effort.” *Id.* at 4. Although *J and V Farms, LLC* may be distinguishable as argued by Employer because no evidence was submitted after the NOD in that case, the intent and purpose behind the CO’s request was the same in both cases. The CO requested documentation from an official source in an effort to ensure compliance with the regulations. Documentation generated by an employer itself does not allow the CO to independently verify the FEINs. Moreover, as found by Judge Clarke, it is not unduly burdensome to require an employer to provide documentation from an official source.

After consideration of the entire administrative record and the Employer’s arguments, I find that it was reasonable for the CO to issue the NOD. If the ETA cannot verify the information required by the regulations, it cannot ascertain whether an employer is eligible under the H-2A program. Therefore, it was reasonable for the CO to require the Employer to submit evidence from an official source to independently verify Employer’s FEINs. Accordingly, I find that the February 16, 2016 NOD was proper and is hereby affirmed.

ORDER

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer's denial determination is **AFFIRMED**.

SO ORDERED.

For the Board:

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge