



**Issue Date: 04 March 2016**

OALJ CASE NO.: 2015-TLC-00022

ETA CASE NO.: H-300-16047-134052

*In the Matter of:*

J AND V FARMS, LLC,  
Employer.

**DECISION AND ORDER AFFIRMING DENIAL**

This matter arises under the labor certification process for temporary agricultural employment in the U.S. under the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the associated regulations promulgated by the Department of Labor at 20 C.F.R. Part 655, Subpart B.

On February 23, 2016, Employer requested an administrative review pursuant to 20 C.F.R. § 655.171(a) to challenge the Notice of Deficiency (“NOD”) issued by the Employment and Training Office, Chicago National Processing Center (“ETA”) on February 23, 2016. Administrative File (“AF”) at 2-3. This office received the Administrative File on February 29, 2016. Both parties filed simultaneous closing briefs on March 3, 2016.

This Decision and Order is based on the written record, which consists of the Administrative File and the briefs of the parties, and is the final decision of the Secretary of Labor. 20 C.F.R. §655.171(a). As explained below, this Decision and Order affirms the NOD and denies Employer’s request for relief.

**Factual Findings and Contentions of the Parties**

On February 16, 2016, Employer filed an Application for Temporary Employment Certification ETA Form 9142A (“Application”) with the ETA as a first time applicant seeking to hire eighteen temporary H-2A workers from April 12 until October 16, 2016. AF at 13-14, 22. In Appendix A of the Application, both Employer and Employer’s attorney, Andrew Jackson, signed statements attesting that the application was accurate to the best of their knowledge. AF at 28-30. The Event History Details recorded by analysts at ETA show that on February 16, 2016, ETA found deniable items in the Application and that a business verification failed. AF at 13. The case was assigned to an analyst, and on February 22, 2016, a NOD letter was generated by Tiffany Holmes. AF at 13. Ms. Holmes’ case notes from that same day indicate that the Application was updated to show “removal of amp sign.” AF at 14. A note from Mary Glusak

on February 23, 2016, approved the NOD and stated that the issue of Federal Employer Identification Number (“FEIN”) verification did “not require the additional review by a Certifying Officer.” AF at 14.

On February 23, 2016, ETA issued the NOD, informing Employer that ETA could not “complete business verification” using the FEIN supplied by Employer in its initial application pursuant to 20 C.F.R. § 655.103(b). AF at 12. ETA specified that Employer could modify its application and cure the deficiency by providing evidence that it possessed the FEIN it provided, and “[t]he FEIN must be specified on a document from an official source, e.g. the State, or tax document from the IRS.” AF at 12.

Employer’s Request for Administrative Review (“Request”) asserts that the regulations do not require any extrinsic proof as to the validity of a FEIN, or permit ETA to require an official source for the FEIN, though it acknowledges that to meet the definition of “employer” in 20 C.F.R. § 655.103(b) an entity must have a valid FEIN. AF at 2. Employer further argues that the Application, including the FEIN, was submitted with a signed statement from both Employer and Employer’s counsel attesting to the accuracy of the information in the Application, and that the attestation is sufficient proof that Employer provided a valid FEIN. AF at 2, 7-9.

Employer, in its request for review, also takes the position that “[u]pon information and belief, [ETA] did not undertake any type of business verification using the FEIN provided.” AF at 2. Employer did not provide any basis for its “information and belief” other than being submitted under the signature of Employer’s counsel, and it did not explain why it believed that ETA had not performed any business verification. In its Brief, Employer argued that a business verification was not required for certification. Employer contends the statute required that only two documents be submitted in addition to the Application, and that ETA must accept and rely on the information stated in the Application. Employer’s Br. at 2-3.

ETA contends that the NOD was properly issued, as it could not validate the FEIN supplied by Employer and Employer therefore did not meet its burden. ETA’s Br. at 5, 7. ETA argues that it was within its reasonable discretion to request documents or evidence be provided in a specific form, including requesting an official document. ETA’s Br. at 4, 5.

#### Legal Standard and Analysis

If a Certifying Officer (“CO”) determines that an application for temporary employment certification under H-2A 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. 20 C.F.R. § 655.141(a); *see* 8 U.S.C. § 1188(c)(2). The notice must state the reasons why the application “fails to meet the criteria for acceptance;” provide the employer with five business days from receipt of the NOD to submit a modified application; state that the CO’s determination of whether to grant or deny the application will be made no later than 30 days prior to the date of need; offer the employer an opportunity to request an expedited administrative review or de novo administrative hearing before an Administrative Law Judge (“ALJ”); and state that if the employer does not submit a

modified application or request an expedited hearing, the CO will deny the application, and that such denial is final and cannot be appealed. 20 C.F.R. § 655.141(b).

An employer may request that an ALJ conduct an administrative review of an NOD. 8 U.S.C. § 1188(e)(1); 20 C.F.R. § 655.141(c), 171(a). The administrative review is based on the administrative record, and any written submissions, which may not include new evidence. 20 C.F.R. § 655.171(a). The decision on administrative review must specify the reasons for the actions taken, and must affirm, reverse, or modify the decision of the CO, or remand to the CO for further action. 20 C.F.R. § 655.171(a). The CO's decision in H-2A cases is reviewed on an "arbitrary and capricious" standard. *Blondin Enterprises, Inc.*, Case No. 2009-TLC-56, slip op. at 3-4 (ALJ July 31, 2009); *Keller Farms*, Case No. 2009-TLC-8 (ALJ Nov. 21, 2008).<sup>1</sup>

An employer is defined for the purposes of H-2A certification 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 (physical location) in the U.S. and a means by which it may be contacted for employment;
- (2) Has an employer relationship (such as the ability to hire, pay, fire, supervise, or otherwise control the work of employee) with respect to an H-2A worker or worker in corresponding employment; and
- (3) Possesses, for purposes of filing an *Application for Temporary Employment Certification*, a valid Federal Employer Identification Number (FEIN).

20 C.F.R. § 655.103(b) (*italics in original*). Only an employer, as defined in the regulation, may demonstrate that labor conditions are such that it is entitled to employ H-2A workers. 20 C.F.R. § 655.103(a). It is the burden of the petitioning employer to establish eligibility for labor certification. 20 C.F.R. § 655.161(a); *Garrison Bay Honey Co., LLC*, Case No. 2011-TLC-00054, slip op. at 4 (ALJ Dec. 2, 2010); *see also BH Construction Group, Inc.*, Case No. 2011-PER-00326, slip op. at 4 (BALCA May 7, 2012) (finding that a failure to prove the employer's physical location by providing a consistent valid address was a proper ground to deny certification); *Miaofu Cao*, Case No. 1994-INA-53, slip op. at 5 (BALCA Mar. 14, 1996) (*en banc*) (finding under the pre-PERM regulations that in a notice of findings the Certifying Officer

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<sup>1</sup> Prior to the issuance of the revised regulations which went into effect on March 15, 2010, the regulations specified that the decision of ETA was to be reviewed for "legal sufficiency." 20 C.F.R. § 655.112(a) (2008). Legal sufficiency, while not defined by the regulations, was interpreted to require an arbitrary and capricious standard. *Bolton Springs Farm*, Case No. 2008-TLC-28, slip op. at 6 (ALJ May 16, 2008). The March 15, 2010, regulations removed the reference to legal sufficiency but did not substitute any other standard of review and no comment was provided to explain the change. 75 Fed. Reg. 6884, 6931 (Feb. 12, 2010). Under the current regulations, some ALJs have continued to apply the arbitrary and capricious standard of review. *Catnip Ridge Manure Application Inc.*, Case No. 2014-TLC-00078, slip op. at 3 (ALJ May 28, 2014); *T.A.F. Shearing Co./Alejandro R. Colqui*, Case No. 2012-TLC-00095, slip op. at 1 (ALJ Sept. 19, 2012). Additionally, ETA has said that the "substance of [the appeals regulation] has remained the same since 1987." 74 Fed. Reg. 45906, 45921 (Sept. 4, 2009). Therefore, I will apply the well-established arbitrary and capricious standard of review.

need only identify the section or subsection violated and the nature of the violation, inform the employer of the evidence supporting the challenge, provide instructions for rebutting or curing the violation, and not mislead the employer as to the specific evidence needed to rebut or cure).

The Department of Labor may issue regulations that require sufficient information to make factual determinations whether an H-2A Temporary Labor Certification should be granted. 8 U.S.C. § 1188; 20 C.F.R. § 655.100. The “Criteria for Certification” set forth in 20 C.F.R. § 655.161 include whether the employer has “complied with *all* of this subpart.” 20 C.F.R. § 655.131(a) (emphasis added). The regulations define an employer as a person with a valid FEIN; if a FEIN cannot be validated, then the number is not valid, and the putative employer fails the regulatory definition, and has not met the criteria for certification. *See 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). ETA issues NODs when an employer’s FEIN cannot be validated, and employers who wish to participate in the H-2A program regularly cure those deficiencies by responding to the NODs. *See, e.g., Katie Heger*, Case No. 2014-TLC-00001, slip op. at 2 (ALJ Nov. 12, 2013); *Bryant Brothers Farm*, Case Nos. 2011-TLC-00332, 00345, slip op. at 1 (ALJ Apr. 5, 2011).

Here, the Administrative Record confirms that ETA attempted to conduct a business verification of Employer, which failed. Since the FEIN supplied by Employer was not valid, Employer could not be certified by ETA. ETA therefore properly notified Employer of the problem and sought additional evidence to verify or correct the FEIN. A strong presumption of regularity is accorded to the acts of government officials, and, in the absence of clear evidence to the contrary, courts presume that public officers have properly discharged their duties. *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). In most cases, the presumption is conclusive unless “irrefragable proof to the contrary” is offered. *Alaska Airlines v. Johnson*, 8 F.3d 791, 795-796 (Fed. Cir. 1993) (citing *Torncello v. United States*, 681 F.2d 756, 770 (Ct. Cl. 1982)). Employer has not offered any evidence to doubt that ETA attempted to but could not verify its FEIN, or that its NOD improperly requested supplemental evidence in the form of an official document to substantiate the validity of Employer’s FEIN. When the statute or regulations do not specify a format in which a submission must be made, ETA 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*, Case No. 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)). Assuming that Employer’s FEIN is in fact valid, it should be possible to provide an official corroborating source without unreasonable effort.

Employer asserts that business verification of the FEIN “is not a criteria for acceptance under existing regulations.” Employer’s Br. at 2. While no specific language in the regulation explains how the validity of a FEIN is to be determined, the requirement that a valid FEIN be submitted logically contemplates some form of authentication. A regulation need not specify each and every tool or procedure used to vet an application.

Employer’s argument that an attestation as to the truth and accuracy of the information in its Application is sufficient to establish the factual accuracy of that information would appear to

preclude ETA from undertaking any meaningful review of an application for temporary labor certification. An attestation that the proffered grounds for certification are valid without supporting evidence or reasoning is not sufficient to carry an employer's burden of proof. *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)). If ETA is not able to verify the address or ability of an employer to hire or pay workers, and must merely take the employer at its word, for example, it would be difficult to verify that "there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of intended employment at the time needed," 20 C.F.R. § 655.103(a), or to oversee the H-2A program. The requirement that an employer provide identifying information helps to ensure that the H-2A system is not being abused. *See Joseph Arnold Natali d/b/a Natali Farms*, Case No. 2015-TLC-00016 (ALJ Feb. 13., 2015) (affirming the CO's denial of an H-2A application where two farms, which operated as one, each sought to hire half-year workers).

If ETA cannot verify that the basic identifying information from an employer is accurate, it cannot be certain that an employer is entitled to participate in the H-2A program. Accordingly, and for the foregoing reasons, I find that the February 23, 2016 NOD issued by ETA was proper, and is hereby affirmed.

SO ORDERED.

RICHARD M. CLARK  
Administrative Law Judge

*San Francisco, California*